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No. _____

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In The

# Supreme Court of the United States

October Term 1990

KENRICH PETROCHEMICALS, INC.,

*Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD,

*Respondent.*

**Petition For Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. WHETHER THE NATIONAL LABOR RELATIONS ACT, AS AMENDED BY TAFT-HARTLEY, DEPRIVES THE NATIONAL LABOR RELATIONS BOARD OF AUTHORITY TO REINSTATE SUPERVISORS WITH BACKPAY.

2. WHETHER THE NATIONAL LABOR RELATION BOARD'S "EXPERTISE" IN FASHIONING REMEDIES FOR UNFAIR LABOR PRACTICES EXCUSES A COURT OF APPEALS' FAILURE TO REVIEW THE BOARD'S ORDER FOR CONSISTENCY WITH THE NATIONAL LABOR RELATIONS ACT.

3. WHETHER AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD REQUIRING REINSTATEMENT OF A SUPERVISOR WITH BACKPAY UNDER CIRCUMSTANCES THAT IGNORE THE EMPLOYER'S RIGHT TO REFUSE TO EMPLOY THE SUPERVISOR BECAUSE OF INHERENT CONFLICTS OF INTEREST CAN FAIRLY BE SAID TO EFFECTUATE THE POLICIES OF THE NATIONAL LABOR RELATIONS ACT.

4. WHETHER THE NATIONAL LABOR RELATIONS BOARD CAN SEEK ENFORCEMENT OF A REMEDY NOT EXPRESSLY AUTHORIZED BY SECTION 10(c) OF THE NATIONAL LABOR RELATIONS ACT WITHOUT ADDUCING SPECIFIC EVIDENCE THAT IMPOSITION OF ITS REMEDY IS NECESSARY TO DISSIPATE THE EFFECTS OF AN UNFAIR LABOR PRACTICE.

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Kenrich Petrochemicals, Inc. (hereinafter "Kenrich"),[1] petitions for a writ of certiorari to review the *in banc* decision of the United States Court of Appeals for the Third Circuit enforcing an order of the National Labor Relations Board (hereinafter "NLRB" or "Board") which requires the Company to reinstate a supervisor, with backpay, to a position in which she will supervise one or more of her own relatives.

## OPINIONS BELOW

The *in banc* decision of the court of appeals (App. A, *infra*, 1a-44a) is reported at 907 F.2d 400 (3d Cir. 1990). The initial panel decision of the court of appeals (App. D, *infra*, 146a-189a) is reported at 893 F.2d 1468 (3d Cir. 1990). The decision and order of the NLRB (App. C, *infra*, 143a-145a) are reported at 294 N.L.R.B. No. 41 (1989) where the decision and recommended order of the Administrative Law Judge (App. B, *infra*, 45a-142a) also appear.

## STATEMENT OF JURISDICTION

The court of appeals filed an opinion and entered judgment in this matter on January 29, 1990 (App. D, *infra*, 146a-189a). On March 20, 1990, following the Board's filing of a timely petition for rehearing and

[1] In accordance with Sup. Ct. R. 29.1, counsel notes that Kenrich has no parent or subsidiary companies.

suggestion for rehearing *in banc*, the full court ordered that the portion of the decision denying enforcement to the Board's order reinstating Helen Chizmar, a supervisor, with backpay (*see* App. D at 171a-175a) be reheard *in banc* (App. E, *infra*, 190a-191a). On July 9, 1990, the court, sitting *in banc*, filed an opinion and entered judgment enforcing the Board's reinstatement order (App. A at 1a-27a). Three of the nine members of the *in banc* panel dissented (App. A at 27a-44a). Jurisdiction is conferred on this Court by 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS

The statutes involved in this matter are set forth in Appendix F (*infra* at 192a-196a). They are:

> 29 U.S.C. § 152(3) (being Section 2(3) of the National Labor Relations Act of 1935 (hereinafter the "NLRA" or "Act") as amended by the Labor Management Relations Act of 1947 (hereinafter "Taft-Hartley"));
>
> 29 U.S.C. § 152(11) (being Section 2(11) of the Act as amended);
>
> 29 U.S.C. § 157 (being Section 7 of the Act as amended);
>
> 29 U.S.C. § 158(a)(1) (being Section 8(a)(1) of the Act as amended);
>
> 29 U.S.C. § 158(a)(3) (being Section 8(a)(3) of the Act as amended);
>
> 29 U.S.C. § 158(a)(5) (being Section 8(a)(5) of the Act as amended);
>
> 29 U.S.C. § 160(c) (being Section 10(c) of the Act as amended);

29 U.S.C. § 160(e) (being Section 10(e) of the Act as amended); and

5 U.S.C. § 556(d) (being part of Section 7 of the Administrative Procedure Act).

## STATEMENT OF THE CASE

Petitioner Kenrich seeks review of a decision enforcing an order of the NLRB requiring it to reinstate a supervisor, with backpay, to a position in which she will supervise one or more of her own relatives. The facts material to consideration of the questions presented by this Petition are set forth below.

### Recognition of the Clerical Unit

Petitioner Kenrich is a Delaware corporation with headquarters in Bayonne, New Jersey, where it is engaged in the sale and manufacture of various chemical products. Kenrich's production workers have been represented since the mid-1950's by Local 8-406, Oil, Chemical and Atomic Workers International Union, AFL-CIO (hereinafter "Union").

In May of 1987, the Company's seven clerical workers signed authorization cards designating the Union as their bargaining representative. These employees were directly supervised by office manager Helen Chizmar. Three of the seven clerical workers were related to Chizmar, two by blood (a sister and a daughter) and a third by marriage (a daughter-in-law).

On May 21, 1987, the clerical workers approached Chizmar, told her of their decision to unionize, and informed her that the Company would be informed the following day. Chizmar's conflicting loyalties as a member of management and as the sister/mother/mother-in-law of the clerical workers caused her great anguish in deciding what to do with this information. Ultimately, she decided to withhold the information from the Company and let it learn of the employees' plans from the Union. Consequently, Kenrich did not learn of the employees' plans until May 22, 1987 when it received a letter from the Union demanding recognition. One week later, on May 29, 1987, Kenrich fired Chizmar.

On June 16, 1987, Kenrich agreed to the clerical workers' demand for recognition and offered to recognize the Union on the basis of a card count. The Union rejected this offer and insisted on a Board election which it won two weeks later. Kenrich subsequently negotiated a contract with the Union, and the Union continues to represent Kenrich's clerical workers today.

**Unfair Labor Practices**

For several weeks during the aftermath of the Union's demand for recognition, the Company's representatives engaged in conduct which resulted in the filing of unfair labor practice charges alleging violations of Sections 8(a)(1) and 8(a)(3) of the NLRA. Included among these was a charge filed with the Board on September 23, 1987, in which Helen Chizmar's daughter alleged that her

mother's discharge violated Section 8(a)(1) of the Act.[2] The Board issued complaints on this and other charges, and these were later consolidated for a hearing before an Administrative Law Judge (hereinafter "ALJ") pursuant to § 10 of the Act. 29 U.S.C. § 160.

In a lengthy opinion issued on December 30, 1988, the ALJ found, *inter alia*, that Chizmar's discharge violated Section 8(a)(1) of the Act (App. B at 133a). In a proposed order also issued that day, the ALJ recommended that Kenrich be ordered to cease and desist from further retaliation against employees through the discharge of their relative-supervisors and that Chizmar be reinstated as office manager with backpay (App. B at 140a). On May 31, 1989, following timely exceptions by Kenrich to the ALJ's findings, the Board adopted the ALJ's decision and order as its own (App. C).

After receipt of the Board's ruling, Kenrich invoked the jurisdiction of the court of appeals by filing a timely Petition for Review pursuant to Fed. R. App. P. 15(a). The Board responded with a Cross-Petition for Enforcement pursuant to Fed. R. App. P. 15(b). Just prior to oral

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[2] Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section [7 of the Act]." Section 7 of the Act, 29 U.S.C. § 157, provides in pertinent part:

> Employees shall have the right to self-organize, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

argument, the panel requested Kenrich and the Board to address whether the Board's remedy for the discharge of Chizmar – namely, her reinstatement as office manager with backpay – was consistent with the statutory exclusion of supervisors from the Act.[3] The parties complied with the panel's request without objection.

On January 29, 1990, the court of appeals filed an opinion agreeing with the Board that Chizmar's discharge and other conduct by Company representatives constituted unfair labor practices. Although the court ordered enforcement of the bulk of the Board's order, a majority of the panel voted to deny enforcement to the remedy requiring Chizmar's reinstatement with backpay (App. D. at 148a-149a). The majority explained that reinstatement of Chizmar as supervisor of a now unionized

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[3] In keeping with Sup. Ct. R. 14.1.(i) which requires petitioner to show the basis for jurisdiction below, Kenrich notes that the exceptions it raised to the ALJ's decision did not contain an express challenge to the proposed remedy for Chizmar's discharge. Importantly, the Board has at no time objected that Kenrich failed to challenge that remedy in a timely manner, nor has it suggested that Kenrich waived that challenge at the administrative level. *See* App. A at 14a n.6. In any event, inattention to a remedy at the administrative level does not bar a subsequent challenge where, as is argued here, the Board "patently traveled outside the orbit of its authority" in fashioning the remedy. *See N.L.R.B. v. Selvin*, 527 F.2d 1273, 1276-78 (9th Cir. 1975) (citing *N.L.R.B. v. Ochoa Fertilizer Corp.*, 368 U.S. 318, 322 (1961)). *But see Purolator Armored, Inc. v. N.L.R.B.*, 764 F.2d 1423, 1431-33 (11th Cir. 1985). Thus, Kenrich's focus on the unfair labor practice charge rather than the remedy at the administrative level did not deprive the court of appeals of jurisdiction over the remedy issue and places no obstacle in the path of this Petition.

clerical unit would serve no legitimate remedial purpose under the Act because: (1) the coercive effects of Chizmar's discharge on employee organizing efforts had dissipated with Kenrich's subsequent offer to recognize the Union and, as evidenced by the Union's victory in the election, had not interfered with the employee's exercise of their Section 7 rights; (2) reinstatement would confer a benefit flowing exclusively to a supervisor who, by definition, stands outside the protective ambit of the Act; and (3) the backpay award was a punitive sanction incompatible with the Board's exclusively remedial powers under the Act (App. D. at 171a-175a). The Board petitioned for rehearing and, on July 9, 1990, after a rehearing *in banc*, a divided court of appeals vacated in part the earlier decision and ordered enforcement of the Board's remedy requiring Chizmar's reinstatement with backpay (App. A at 27a).

Judge Stapleton, in his opinion for the six member majority, reasoned that the Board's experience in evaluating the effects of unfair labor practices and its expert judgment in the formulation of remedies for such practices merit the court's deference (App. A at 11a-18a). He further reasoned that although the Board is free to draw on its experience in other cases in fashioning a remedy, the record in this case supports the Board's determination that Chizmar's reinstatement with backpay is necessary to protect the Section 7 rights of Kenrich's employees "by assuring them that they need not fear that the exercise of their rights will give the Company a license to inflict harm on their family" through the discharge of supervisor-relatives (App. A at 20a). Judges Greenberg, Garth and Hutchinson joined in a lengthy dissent (App. A at

27a-44a). Chief Judge Higginbotham and Judge Becker did not participate in the *in banc* rehearing.

## REASONS FOR GRANTING THE WRIT

The Court should grant Kenrich's petition because, as recognized by the court of appeals sitting *in banc*, the case raises "an important issue of federal labor law" (App. A at 3a); namely, to what extent may the Board, in seeking to vindicate the statutory rights of rank-and-file employees, limit an employer's otherwise unfettered right to discharge a supervisor? *See* App. D at 162a.

The Board's order requires Kenrich to reinstate Helen Chizmar, a supervisor, with backpay as a remedy for an unfair labor practice, that practice being the discharge of Chizmar in retaliation for her relative's participation in a union organizing campaign. Kenrich accepts the court of appeals' ruling, as announced by Judge Greenberg, that Chizmar's discharge violated Section 8(a)(1) of the Act (App. D at 159a-171a). Kenrich's sole contention in this Petition is that the Board's remedy for that violation – reinstatement with backpay – cannot be enforced.

The Court should grant review because, as noted by the court of appeals, the circumstances of this case bring into sharp relief difficult and recurring problems in the federal labor law (App. D at 162a), and because the Court has not addressed these problems before. The questions raised by this case and the reasons they should be reviewed are set forth in Points I through IV below.

## *POINT I:* THE NATIONAL LABOR RELATIONS ACT DOES NOT AUTHORIZE THE BOARD TO REINSTATE SUPERVISORS WITH BACKPAY

### Legislative History

The Board's authority to remedy unfair labor practices arises from Section 10(c) of the Act. 29 U.S.C. § 160(c). That provision empowers the Board to order those who violate the Act "to cease and desist from such unfair labor practice, and to take such affirmative action *including reinstatement of employees with or without backpay,* as will effectuate the policies of the Act." *Id.* (emphasis added). This language authorizes the Board to order the reinstatement of "employees" only – a term which excludes "supervisors" by definition. *See* 29 U.S.C. § 152(3) & (11). Because there is no express authorization for it, "[a] supervisor's reinstatement with backpay, if permissible, lies within the nebulous terrain of other 'affirmative action' the Board may take, in addition to issuing a cease and desist order, to 'effectuate the policies' of the Act." App. A at 35a, n.4 (Greenberg, J., dissenting).

The Court has long recognized the Board's peculiar competence in fashioning remedies to relieve the ill effects of unfair labor practices. *See N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344, 349 (1953). As a result, the courts generally defer to the Board's application of its remedial authority under Section 10(c). The courts need not and should not defer, however, to the Board's interpretation of the scope of its authority under Section 10(c) as that is a matter of interpreting, as opposed to implementing, the Act and is an enterprise in which the Board

enjoys no special competence. *Cf. Hi-Craft Clothing Co. v. N.L.R.B.*, 660 F.2d 910, 912-16 (3d Cir. 1981) (Board's interpretation of its own authority accorded little deference).

A review of the NLRB's record of statutory interpretation reveals that given a choice between limiting its authority or expanding its reach, the Board will opt for expansion. Indeed, the legislative history of the Labor-Management Relations Act of 1947 confirms that the Taft-Hartley amendments were prompted in part by the Board's penchant for interpreting the NLRA to expand its jurisdiction and enhance its authority. The committee reports on the amendments are especially forceful in expressing congressional disapproval of the Board's habit of overreaching where an employer's unfettered right to choose supervisors of its own liking is concerned:

> What the bill does is to say what the law always has said until the Labor Board, in the exercise of what it modestly calls its "expertness," changed the law: That no one, whether employer or employee, need have as his agent one who is obligated to those on the other side, or one whom, for *any* reason, he does not trust.

H.R. Comm. on Education and Labor, Labor-Management Relations Act of 1947, H.R. Rep. No. 245, 80th Cong., 1st Sess. at 17, *reprinted in* 1 NLRB Legislative History of the Labor Management Relations Act of 1947, at 308 (1948) (emphasis in original). *See also*, Senate Comm. on Labor and Public Welfare, Federal Labor Relations Act of 1947, S. Rep. No. 105, 80th Cong., 1st Sess. at 3-5, *reprinted in* 1 NLRB Legislative History of the Labor-Management Relations Act of 1947, at 409-11 (1948).

In bringing the Board to heel, Congress amended Sections 2(3) and 2(11) of the Act to establish a bright line separating employees, who are protected by the Act, from supervisors, who are not. Kenrich submits that Congress' bright line extends into the nebulous terrain of Section 10(c) and deprives the Board of authority to reinstate a supervisor with backpay. Had Congress wanted to give the Board such authority, it could easily have done so by amending Section 10(c) to read, "including reinstatement of employees *and supervisors*" or, more simply, "including reinstatement of *individuals*," the latter being the term chosen by Congress for use elsewhere in Section 10(c) to embrace employee and non-employee alike.

Kenrich requests that the Court grant this petition to determine whether Congress, in amending the NLRA, denied the Board the power to reinstate supervisors and whether the Board, by ordering the reinstatement of Helen Chizmar with backpay, has "patently travelled outside the orbit of its authority." *Selvin, supra*, 527 F.2d at 1276.

**Court Precedents**

Despite the legislative history of the Taft-Hartley amendments which suggests that the Board has no authority to order the reinstatement of a supervisor with backpay, numerous courts of appeals have enforced such orders.[4] This Court has twice taken notice of such cases

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[4] *See, e.g., Howard Johnson Co. v. N.L.R.B.*, 702 F.2d 1 (1st Cir. 1983); *N.L.R.B. v. Electro Motive Mfg. Co., Inc.*, 389 F.2d 61

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but has never ruled whether they were correctly decided. *See Florida Power & Light Co. v. I.B.E.W.*, 417 U.S. 780, 808 n.18 (1974); *Iron Workers Local 207 v. Perko*, 373 U.S. 701, 707-08 (1963).

An analysis of court of appeals decisions enforcing supervisor reinstatement and backpay orders reveals that they share a common ancestor: a 1954 decision in which the United States Court of Appeals for the Fifth Circuit, considering the issue for the first time after the 1947 amendments, ruled that supervisor reinstatement orders are enforceable. *N.L.R.B. v. Talladega Cotton Factory, Inc.*, 213 F.2d 209 (5th Cir. 1954). Kenrich submits that while *Talladega* is of venerable vintage, it is based on an erroneous analysis of the Act which, if not reviewed by this Court, will continue to lead the courts of appeals into error.

In *Talladega* the Board sought enforcement of an order requiring reinstatement, with back pay, of two supervisors discharged "for failing at their employer's behest to thwart a union's organizational efforts." 213 F.2d at 210. The employer challenged the order on grounds that reinstatement of a supervisor is prohibited by the express language of the amended Act which excludes supervisors from the definition of "employee". *Id.* at 216. The *Talladega* court rejected this argument on the basis of *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177 (1941), a case decided

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(4th Cir. 1968); *Belcher Towing Co. v. N.L.R.B.*, 614 F.2d 88 (5th Cir. 1980); *Oil City Brass Works v. N.L.R.B.*, 357 F.2d 466 (5th Cir. 1966); *N.L.R.B. v. Miami Coca-Cola Bottling Co.*, 341 F.2d 524 (5th Cir. 1965). *See generally* Annot., 64 A.L.R. Fed. 398 (1983).

six years *before* Congress amended the statutory definition of "employee" to exclude supervisors. *See* 213 F.2d at 217.

In *Phelps Dodge*, the Court was asked to decide whether the Board could order the reinstatement of rank-and-file job applicants denied employment because of union affiliation. Although such discriminatory hiring practices clearly violate section 8(a)(3) of both the original and amended Act, the employer opposed "reinstatement" because section 10(c) mentioned the reinstatement of employees only, and because a job applicant is not, strictly speaking, an employee. The Board argued that section 10(c)'s reference to the reinstatement of employees was merely illustrative and that its authority to "take such affirmative action . . . as will effectuate the policies of this Act" empowered it to order the hiring of non-employees who suffered discrimination. The *Phelps Dodge* Court agreed with the Board stating, "We find no justification whatever for attributing to Congress such a casuistic withdrawal of the authority which, but for the illustration, is clearly given the Board." 313 U.S. at 189. Six years later, Congress adopted the Taft-Hartley amendments expressly excluding supervisors from the definition of employee.

The *Talladega* court extended the Supreme Court's *Phelps Dodge* rationale on job-applicants to the post Taft-Hartley question of supervisors. The extension was erroneous, for while Congress made no effort to change the definition of "employee" to include or exclude job applicants and thus did not change the statutory foundation on which the *Phelps Dodge* decision rests, Congress expressly excluded supervisors from the definition of

"employee" thereby endowing the term with a special meaning unknown and irrelevant to the *Phelps Dodge* Court. As a result, *Phelps Dodge* can be said to be authoritative only with regard to the Board's power to order reinstatement of job applicants who, but for a violation of Section 8(a)(3), would have achieved the status of employees subject to the jurisdiction of the Board and entitled to the protection of the Act. Because a supervisor enjoys no prospect of achieving the protected status of an employee under the jurisdiction of the Board, the rationale underlying *Phelps Dodge* does not confirm the Board's authority to reinstate supervisors.

Rather than recognize *Phelps Dodge* as a starting point in the analysis of the Board's power to reinstate non-employees, the *Talladega* court took it as an endpoint and dismissed further analysis as "undue preoccupation with statutory definition." 213 F.2d at 217. The petitioner respectfully submits that *Talladega* is not authoritative and that the important and recurrent question of the Board's authority to reinstate a supervisor with backpay as a remedy for an unfair labor practice should be resolved by this Court.

## *POINT II:* THE COURT OF APPEALS ABDICATED ITS RESPONSIBILITY TO REVIEW THE BOARD'S ORDER FOR CONSISTENCY WITH THE ACT

Even if the reinstatement of a supervisor with backpay is permitted under the Act, the remedy cannot be enforced in this case until the court of appeals undertakes a proper review of the Board's reinstatement order. Proper review requires the court of appeals to test the

Board's remedy against standards established by this Court to ensure that the remedy will further the policies of the Act.

This Court has ruled that a reviewing court should not disturb the Board's remedial orders "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co. v. N.L.R.B.*, 319 U.S. 533, 540 (1943). As the passage suggests, due deference to the Board's expertise in fashioning remedies for unfair labor practices limits but does not eliminate the role of judicial review in effectuating the policies of the Act. Deference is not synonymous with blind acceptance.

The decisions of this Court establish standards which are necessary to check the Board's tendency to overreach its remedial authority and which should guide the courts of appeals in reviewing the Board's orders. First, the Board's remedial rules and orders must be tested for rationality and for consistency with the Act. *Beth Israel Hospital v. N.L.R.B.*, 437 U.S. 483, 501 (1978). Second, the Board's remedies must be "tailored" to the particular circumstances to which they are addressed. *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 900 (1984). This means that although the Board is free to draw on its experience and expertise in fashioning a remedy, it cannot ignore circumstances in a particular case that would make the application of a generic remedy inappropriate or oppressive. *See Seven-Up, supra*, 344 U.S. at 349. Third, the Board's orders may "expunge only the *actual*, and not merely *speculative*, consequences of the unfair labor practices." *Sure-Tan, supra*, 467 U.S. at 900 (emphasis in original). This means

that an order that would deter future unfair labor practices but is unnecessary to make the victims of past violations whole cannot be enforced. *See Republic Steel Corp. v. N.L.R.B.*, 311 U.S. 7, 12 (1940). Finally, the Board's orders must be remedial, not punitive. *Id.* at 12-13.

In light of these precedents, the court of appeals should not have enforced the reinstatement of Helen Chizmar with backpay unless satisfied that the remedy was (1) rational and consistent with the Act, (2) tailored to the particular circumstances obtaining at Kenrich, (3) actually necessary to make members of the clerical unit whole, and (4) free of any punitive purpose or effect. The court of appeals erred in deferring to the Board's expertise in fashioning remedies, for, as discussed fully in Point III, *infra*, the reinstatement of Helen Chizmar is in conflict with the standards established by this Court. The Court should grant review in this case to address the proper role of the courts of appeals in reviewing NLRB orders reinstating supervisors with backpay.

## *POINT III*: THE REINSTATEMENT OF HELEN CHIZMAR WITH BACKPAY WILL NOT EFFECTUATE THE POLICIES OF THE ACT

As noted above, a reviewing court will not disturb a remedial order of the Board "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric, supra*, 319 U.S. at 540. Even if the reinstatement of a supervisor with backpay were permitted under the Act, it cannot be allowed under the circumstances of this case because the reinstatement of

Helen Chizmar frustrates rather than effectuates the policies of the Act.

As noted in Point II, *supra*, the decisions of this Court teach that the Board's remedial order cannot fairly be said to effectuate the policies of the Act unless it is (1) rational and consistent with the Act, (2) tailored to the particular circumstances obtaining at Kenrich, (3) actually necessary to make members of the clerical unit whole, and (4) free of any punitive purpose or effect. The reinstatement of Helen Chizmar with backpay does not satisfy these requirements. Consequently, the Board's remedy cannot be enforced.

**(1) The Remedy is Irrational and Inconsistent with the Act**

An order requiring an employer to reinstate a supervisor who, through the obligations of blood and marriage, is tied to the very employees she manages cannot said to be consistent with the Act.[5] The legislative history of the Taft-Hartley amendments makes it clear beyond doubt that Kenrich need not accept as its representative a supervisor "who is obligated to those on the other side, or one whom, for *any* reason, [it] does not trust." H.R.

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[5] Counsel has verified that, as of the date of this Petition, Helen Chizmar's sister remains an employee in the clerical unit. If, after further consideration of the Board's order in accordance with the initial decision of the court of appeals (App. D. at 187a), the Board's proposed order is enforced, Chizmar's daughter will be offered reinstatement to the clerical unit as well. Thus, if reinstated, Chizmar will supervise one or more of her own relatives.

Rep. No. 245, 80th Cong., 1st Sess. at 17 (emphasis in original). The Board's order, by requiring Kenrich to reinstate Chizmar as the supervisor of her now unionized relatives, requires Kenrich to forfeit this right.[6]

Once again the Board, "in the exercise of what it modestly calls its 'expertness'," has changed the law. *Id.* The Court should grant review to determine whether the Board's disregard for Kenrich's rights is consistent with the Act and whether the trampling of one party's rights to restore those of another is a "rational" remedy.

**(2) The Remedy is not Tailored to the Circumstances of the Case**

The Board has not tailored its remedy to the circumstances of this case. It has imposed a generic remedy without considering the conflict created by Chizmar's relation to the employees she supervises. That conflict cannot be resolved, for Kenrich cannot remove Chizmar's relatives from the bargaining unit, and there exists no

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[6] The court of appeals' reliance on *Advertiser's Manufacturing Co.*, 280 N.L.R.B. No. 128 (1986), *enforced sub nom*, 823 F.2d 1086 (7th Cir. 1987), is misplaced. *See* App. A at 21a-26a. As fully addressed by the dissent, Chizmar's relation to the employees she supervises fatally distinguishes this case from *Advertiser's Manufacturing*. *See* App. A at 29a-30a (Greenberg, J., dissenting). Consequently, *Advertiser's Manufacturing* does not address the conflict of interest issue created by Chizmar's reinstatement and is not equal to the task presented by this case.

supervisory position for Chizmar in which she will not directly manage family members.[7]

The Board's generic remedy denies Kenrich its right to refuse employment to a supervisor who is subject to conflicting loyalties because of ties to the bargaining unit. The Court should grant review to determine whether the remedy is inappropriate or oppressive and therefore unenforceable. *See Seven-Up, supra,* 467 U.S. at 900.

**(3) The Remedy is not Needed to make the Clerical Workers Whole**

The reinstatement of Helen Chizmar with backpay is unnecessary because the coercive effects of her discharge have already been expunged. Kenrich accepts the Board's finding that Chizmar's discharge on May 29, 1987, constituted interference with the clerical workers' exercise of their right to organize in violation of Section 8(a)(1). Mitigation of the effects of that interference began within days after Chizmar's discharge when Kenrich voluntarily offered to recognize the bargaining unit. The Union's

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[7] In his Opinion, the ALJ suggests that Kenrich could easily work around Chizmar's conflict of interest by excusing her from Union negotiations and relieving her of other bargaining unit responsibilities (App. B at 101a). This suggestion moves the Board's remedial authority beyond its old benchmark – reinstatement with backpay – into a new frontier. In suggesting that Kenrich accommodate Chizmar's conflicting loyalties, the ALJ assumes that the Board's authority to reinstate a supervisor empowers it to alter the supervisor's job description. This suggestion is further evidence of the Board's penchant for overreaching the limits imposed on it by the Taft-Hartley amendments.

subsequent election victory and the negotiation of a collective bargaining agreement for the clerical unit attest to the success of that mitigation as no employee was coerced into disavowing their support for the Union or suspending organizational efforts.

In enforcing the Board's remedy, the court of appeals speculates that Chizmar's discharge coupled with a subsequent comment by Kenrich's president have left residual effects which can be remedied only through her reinstatement with backpay.[8] In particular, the court prophesies that if Chizmar's discharge is left unremedied,

> the fears engendered by that discharge and [the president's] later threats will not be dispelled. Rather, a powerful message will be sent out to the supervisors and employees of Kenrich that the company may, without fear or redress, use family member supervisors as hostages. . . . In the course of deciding whether to take some form of protected action, these employees will realize that if they vigorously exercise their legal rights, their close relatives who are supervisors may be fired . . . . (App. A at 20a).

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[8] In testimony before the ALJ, the Union's chief steward alleged that Kenrich's president commented that he wanted to "get rid of the whole [Chizmar] family" during the negotiations for the clerical unit contract which began after the Union won the election. *See* App. A at 8a. As noted by the dissent, the statement is of no significance to the question of "actual harm" at issue here. Had the statement been challenged through an unfair labor practice charge it might have supported a finding of bad faith bargaining in violation of Section 8(a)(5). 29 U.S.C. § 158(a)(5). The statement was not challenged, and the contract negotiations were concluded without incident. *See* App. A at 42a.

The majority is reduced to speculation about the consequences of reinstating Helen Chizmar because the record contains no evidence of actual injury to the employees' organizational rights. Kenrich acknowledged the futility of efforts to undermine those rights when it agreed to recognize the Union within days of discharging Chizmar. The vindication of those rights remedied any actual harm arising from Chizmar's discharge. The enforcement of the Board's reinstatement order on the prospect of the purely speculative consequences cited by the court of appeals is incompatible with the Act. *See Sure-Tan, supra,* 467 U.S. at 900.

Even if there were evidence of actual harm sufficient to support the remedy, the reinstatement of Helen Chizmar would not have the salutary effect anticipated by the court of appeals. In assuming that the reinstatement of Chizmar is necessary to assure employees that the exercise of their Section 7 rights will not jeopardize the job security of a relative-supervisor, the court of appeals ignores the fact that the Taft-Hartley amendments allow Kenrich to fire Chizmar precisely because her relatives exercised those rights. Because Chizmar's relatives have unionized, Kenrich has legitimate concerns about her ability to accommodate conflicting loyalties and is permitted to remedy those concerns by terminating her. *See* App. A at 31a-32a (Greenberg, J., dissenting). The Court should grant review to determine whether a remedy which is not well-grounded in fact and which will not have the anticipated salutary effect on employees is too speculative to be enforced.

**(4) The Backpay Remedy is Punitive**

If the salutary effects of Chizmar's reinstatement are, at best, speculative, the Board's award of backpay to a former supervisor can be characterized as nothing other than punitive. As discussed above, the Taft-Hartley amendments will permit Kenrich to terminate Chizmar to eliminate concerns regarding her ability to supervise her own relatives. This right renders the Board's reinstatement order a practical nullity having no greater benefit on protected employees than a cease and desist order.

The backpay award attached to the reinstatement order flows exclusively to the benefit of Chizmar. Since it is unlikely that she will be permitted to return to her former position, the award will not remedy any actual, compensable injury suffered by an employee. *Sure-Tan, supra,* 476 U.S. at 901. Under these circumstances, the sole purpose served by the backpay award is to penalize Kenrich for violating the Act.

The Board is not authorized to exercise its remedial authority in this punitive manner. *See Republic Steel, supra,* 311 U.S. at 10-11, 12-13. The Court should grant review to determine whether a backpay award which inures solely to the benefit of a supervisor is enforceable.

## *POINT IV*: THE BOARD'S REMEDY IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE

The reinstatement of a supervisor with backpay is nowhere expressly authorized by the Act. *See* 29 U.S.C. § 160(c). The fact that supervisors stand outside the

Board's jurisdiction and are not protected by the Act marks any order requiring their reinstatement as an extraordinary remedy and, given the legislative history of the Taft-Hartley amendments, *see* Point I, *supra*, inherently suspect under the Act. The remedy merits even greater scrutiny under the facts of this case because it compels Kenrich to revive an employment relationship which it has the unfettered discretion to discontinue. *See* App. A at 27 (Greenberg, J., dissenting).

In his dissent, Judge Greenberg suggests that the Board, not the employer, should bear the burden of producing specific evidence establishing the necessity for an extraordinary remedy to dissipate the effects of an unfair labor practice. *See* App. A at 39a. This view is consistent with the express provisions of Section 7 of the Administrative Procedure Act ("APA") which requires the Board, as the proponent of the reinstatement and backpay order, to support its order with reliable, probative, and substantial evidence. 5 U.S.C. § 556(d); *cf.* 29 U.S.C. § 160(e).

The approach adopted by the majority below – uncritical deference to the Board's expert judgment, an "expertness" so disparaged by Congress that it removed supervisors from the definition of "employee" – is incompatible with the APA for it excuses the Board from its burden of proof. In accepting the Board's remedy, the majority focused on the Board's authority as a policymaker and lost sight of the Board's responsibilities as a factfinder. The resulting deference is erroneous because it accepts the validity of the Board's remedy as a presumption of law instead of requiring the Board to show that its remedy serves the facts. *Cf. N.L.R.B. v. Curtin Matheson*

*Scientific, Inc.*, ___ U.S. ___, ___, 110 S.Ct. 1542, 1562-66 (1990) (Scalia, J., dissenting).

The Court should grant review to determine whether the Board may impose an extraordinary remedy on an employer in the absence of specific and substantial evidence establishing the necessity for the remedy.

## CONCLUSION

For the foregoing reasons, petitioner Kenrich Petrochemicals, Inc., requests that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Third Circuit sitting *in banc*.

Respectfully submitted,

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DATED: AUGUST 28, 1990

JOHN L. THURMAN
On the Petition

**APPENDIX A**

Filed July 9, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 89-3392 and 89-3500

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KENRICH PETROCHEMICALS, INC.,
Petitioner in No. 89-3392

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent

KENRICH PETROCHEMICALS, INC.
Respondent

vs.

NATIONAL LABOR RELATIONS BOARD,
Petitioner in No. 89-3500

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On Petition for Review from the
National Labor Relations Board
(N.L.R.B. Nos. 22-CA-15105, 22-CA-15258,
and 22-CA-15319)

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Argued December 14, 1989

BEFORE: STAPLETON, GREENBERG,
and GARTH, Circuit Judges

(Filed January 29, 1990)

Reargued In Banc May 7, 1990

BEFORE: SLOVITER, Acting Chief Judge, STAPLETON,

MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, and GARTH, Circuit Judges

(Opinion Filed July 9, 1990)

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## OPINION OF THE COURT

STAPLETON *Circuit Judge:*

Today we address an important issue of federal labor law: whether the National Labor Relations Board (NLRB or Board) may order the reinstatement of a supervisor who was fired in retaliation for her relatives' participation in a union organizational campaign when that campaign succeeded subsequent to the supervisor's discharge. We conclude that the Board's decision to order reinstatement under these circumstances was within the broad discretion afforded it to award such affirmative relief as will effectuate the policies of the National Labor Relations Act (NLRA or Act), 29 U.S.C. § 151 *et seq.* Therefore, we will enforce the Board's order.

### I.

This appeal came before a panel of this court on cross-petitions for review filed by Kenrich Petrochemicals, Inc. (Kenrich) and the Board. In its petition, Kenrich made numerous arguments as to why the NLRB had gone astray in adopting the order of an administrative law judge (ALJ) determining that Kenrich had committed a wide range of unfair labor practices in reaction to efforts to unionize its clerical workers. The Board in turn petitioned for enforcement of its order requiring Kenrich to remedy these unfair labor practices. The panel's thorough opinion addresses all of the issues thus raised. *See Kenrich Petrochemicals, Inc. v. NLRB*, 893 F.2d 1468 (3d Cir. 1990).

The members of this court granted rehearing in banc in order to address only one of those issues, namely, whether the Board exceeded its authority by directing the reinstatement of supervisor Helen Chizmar. We have vacated only that part of the panel opinion entitled "Remedy Regarding Helen Chizmar", printed at 893 F.2d at 1480-1482, dealing with this issue.

Kenrich manufactures and sells various chemical products. It is a family-owned business that was founded by Eric Spiegelhalder. Spiegelhalder is the father of Kenrich Vice-President Erica Monte, who is married to the company's current President, Salvatore Monte. Several of the Monte's children have been employed by Kenrich at various times.

Kenrich is a family business not only in the sense that it is owned by and provides employment for the Spiegelhalders; it was for years also the employer of several members of the Chizmar family. Helen Chizmar was employed by Kenrich for twenty-four years prior to her discharge on May 29, 1987, and for the last ten of those years served as Kenrich's office manager and supervised its clerical staff. Helen Chizmar's father, Frank Sakowski was the first union shop steward for Kenrich's production workers, who have been represented since the mid-1950's by Local 8-406, Oil, Chemical and Atomic Workers International Union, AFL-CIO. As of May 1987, three other members of Helen Chizmar's family were employed by the company: sister Barbara Knorowski, a sales order clerk who had been with Kenrich since 1962; daughter Karen McPartlan, who had ten years of service with the company and also was a sales order clerk; and daughter-in-law Catherine Chizmar, a secretary who had

worked on and off for Kenrich since 1975. Each of these members of the Chizmar family were members of the clerical staff supervised by Helen Chizmar. This situation was apparently not unusual at Kenrich, where, according to Salvatore Monte, many of the rank-and-file production employees are related to supervisors.[1]

In May of 1987, Knorowski, Catherine Chizmar, McPartlan, and the other four members of Kenrich's clerical staff, Michelle Bobb, Marge McNally, Judy Kobryn, and Linda Ferrano, signed authorization cards designating Local 8-406 as their bargaining representative. On May 21, 1987, the clerical workers went to Helen Chizmar as a group and told her of their decision to unionize and informed her that the company would receive a letter the next day demanding recognition. Helen Chizmar was, by her account, both shocked and upset at this news. She thought about telling her superiors about the unionization drive that day. However, she was aware that the company would receive the letter the next day in any event, and feared that if she went to her superiors she would be suspected of being involved in the union campaign because of her family members' participation. The next day the company did receive the letter from the union, and Salvatore Monte was greatly displeased by the clerical staff's support for a union.

On May 29, 1987, the same day that Kenrich received notice of the petition the union had filed with the NLRB seeking recognition on the basis of the unanimous card

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[1] For example, supervisor Thomas Washington's son Thomas Washington, Jr. is a union member and production employee, under his father's supervision.

count, Monte called Helen Chizmar into his office and discharged her. As Monte fired Chizmar, he explained that: "[we] have to let you go, Helen. We just can't afford you anymore . . . we think we can get somebody for $20,000 less and that's what we plan to do." He also told Chizmar that she had done a good job. Monte did not tell Chizmar she was being fired because of the conflict of interest posed by her acting as supervisor of a unionized unit containing members of her family, the rationale advanced by Monte at the administrative hearing.

Later that day Monte gave a different reason for Chizmar's firing, telling Kenrich's buyer and admitted agent, Jill Bernicker that "[h]e couldn't keep her for financial reasons and [he] was not going to put up with any union bullshit." App. at 105; 150; 207; 275-76. Despite this reference by Monte to the union, there is no evidence that Chizmar engaged in any pro-union activity or failed to carry out a directive issued by her superiors at Kenrich.

At the time of Chizmar's discharge, Monte still hoped to defeat the union and focused his anti-union strategy largely on Helen Chizmar's daughter-in-law, Catherine. Monte believed that Knorowski and McPartlan would be strong union supporters because unionization was in their "family culture," App. at 394, but that Catherine Chizmar was questionable because she had expressed some dissatisfaction with her mother-in-law in the past. Further, Monte had made Linda Ferrano his confidential secretary, thus rendering her ineligible for union member status, and Judy Kobryn was leaving the company. Given these factors, McNally, Bobb, and Catherine Chizmar would be the swing votes in any election,

and if any one of them supported the union, the union would win.

On June 3, 1987, Salvatore and Erica Monte and Eric Spiegelhalder met with these three workers to attempt to dissuade them from joining the union. Sometime after this meeting, Salvatore Monte spoke with Catherine Chizmar individually after learning she had expressed fears that she would be fired. Monte asked her why she felt that way. She responded that her mother-in-law had been fired after 24 years of service to Kenrich, and that on June 1, 1987, her sister-in-law, McPartlan, and aunt, Knorowski, had each been informed that they would henceforth have to work full-time, despite a long-standing practice whereby they worked part-time or more flexible hours.[2] As she testified: "it seemed like a pattern. It was just going right down the line and I just felt like any day now something would happen to me." App. at 136. Monte reassured Catherine Chizmar about her job security, and said that he fired Helen Chizmar because she could not do the technical end of her job. Monte then began talking about the union, and told her that "[i]f you vote in a union you have to start from scratch. No benefits, no salary, no vacations . . . . " App. at 136-37. He asked Chizmar whether she would like to punch a time clock. The Board found, and Kenrich has not contested, that these statements were unfair labor practices.

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[2] The Board determined that the elimination of part-time employment among the clerical staff violated sections 8(a)(1) and 8(a)(3) of the Act. Kenrich did not seek review of this finding.

Later that same day, Monte again approached Catherine Chizmar. He told her he could not fire her because of the Act, and began to give another explanation for her mother-in-law's firing, stating he could not afford Helen Chizmar's salary, and was never able to satisfy her demands. Monte then told Catherine Chizmar that the worst thing that could happen to Kenrich was a union.

After these conversations, Monte became convinced that, despite his efforts to convince her to do otherwise, Catherine Chizmar was going to vote for the union. A solid union majority therefore existed. Thus, Monte instructed Kenrich's counsel to inform the union that Kenrich would voluntarily recognize it pending a card count. As is fully described in the panel opinion, shortly thereafter there ensued a serious incident in which Monte, motivated by anti-union animus, knocked Barbara Knorowski against a filing cabinet and proceeded to verbally abuse her and Catherine Chizmar. These acts were among several unfair labor practices directed at members of Helen Chizmar's family by the company in retaliation for their support for the union.

The union rejected Kenrich's offer to recognize it on the basis of the card count and insisted on an election. An election was held on July 2, 1987, and the union was victorious. A certificate of representative status was issued by the NLRB on July 10, 1987. Collective bargaining between the union and Kenrich commenced in September of 1987. During the course of these negotiations, Monte told union negotiators that he was going to "get rid of the whole [Chizmar] family." App. at 269.

As of today, Helen Chizmar has not been rehired by Kenrich.

II.

While acknowledging that supervisors are not employees cloaked with section 7 rights, *see* 29 U.S.C. § 152(3) & (11), the ALJ and the Board held that Chizmar's discharge was unlawful under section 8(a)(1) of the Act not because it interfered with Chizmar's rights but because it directly interfered with the section 7 rights of Kenrich's clerical workers, who were clearly protected by the Act.[3] The panel affirmed this determination as in accordance with prior Board decisions finding a violation of section 8(a)(1) where a supervisor who had not engaged in pro-union conduct was discharged in retaliation for the protected concerted activities of her close relatives. *Kenrich Petrochemicals*, 893 F.2d at 1477 (citing *Advertiser's Manufacturing Co.*, 280 NLRB 1185 (1986), *enforced*, 823 F.2d 1086 (7th Cir. 1987); *Consolidated Foods Corp.*, 165 NLRB 953 (1967); *Golub Brothers Concessions*, 140 NLRB 120 (1962)).

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[3] Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), makes it an unfair labor practice for an employer to "interfere with, restrain or coerce employees in the exercise of the rights guaranteed in section [7 of the Act]". Section 7 of the Act, 29 U.S.C. § 157, provides in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities

(Continued on following page)

The panel also concluded that the ALJ was justified in finding that "Kenrich failed to prove that Chizmar's anticipated conflict of loyalties in fact contributed to its discharge decision." *Id.* at 1480. It noted in this regard that this conflict of interest excuse did not emerge until the hearing before the ALJ, and that Monte gave different reasons for the firing to Helen and Catherine Chizmar. The panel also agreed with the ALJ that the timing of Helen Chizmar's firing was very probative, coming at a time when Kenrich believed it could defeat the union and shortly before vigorous attempts to convince its clerical workers, and in particular Catherine Chizmar, to oppose the union. Thus, Monte's contention that he could not keep Chizmar because she could not give Kenrich her undivided loyalty in grievance proceedings or contract negotiations was undermined because Monte hoped at that time to defeat the union and thereby avoid the very need for its supervisors to undertake these responsibilities. The panel concluded that given the lack of substantiation for Kenrich's conflict of interest rationale "the Board and the ALJ were justified in finding that Kenrich's belated explanation for the discharge was pretextual and Kenrich's sole intent was to retaliate against Chizmar's relatives for attempting to unionize." *Id.* at 1480.

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(Continued from previous page)

for the purpose of collective bargaining or other mutual aid or protection . . . .

III.

To remedy Helen Chizmar's unlawful firing, the ALJ and the Board ordered that she be reinstated, with an award of back pay, to her position as office manager at Kenrich. Kenrich contends that this remedy is unenforceable as it is inconsistent with the Act's exclusion of supervisors from its protective ambit, and because it serves no proper remedial purpose. The panel agreed with Kenrich that the reinstatement of Helen Chizmar served no remedial purpose and on that ground refused to enforce the Board's order.

We review remedial orders of the Board for abuse of discretion. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 311 & n. 10 (1979); *NLRB v. Nat'l Car Rental System, Inc.*, 672 F.2d 1182, 1191 (3d Cir. 1982). This scope of review is in keeping with the congressional intent reflected in § 10(c) of the Act, 29 U.S.C. § 160(c),[4] which:

> charges the Board with the task of devising remedies to effectuate the policies of the Act. The Board's power is a broad discretionary one, subjected to limited judicial review. The relation of remedy to policy is peculiarly a matter for administrative competence. In fashioning remedies to undo the effects of violations of the Act, the Board must draw on enlightenment gained from experience. The *Board's order will not be disturbed unless it can be shown that the order is a patent attempt to achieve ends other than*

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[4] This provision gives the Board authority to "take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of the [Act]." 29 U.S.C § 160(c).

> *those which can fairly be said to effectuate the policies of the Act.*

*Fibreboard Paper Products Corp. v. NLRB*, 379 U.S. 203, 216 (1964) (emphasis added; citations and quotations omitted); *accord Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984); *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n. 32 (1969); *NLRB v. Seven-Up Bottling Co. of Miami, Inc.*, 344 U.S. 344, 347 (1953); *Virginia Elec. & Power Co. v. NLRB*, 319 U.S. 533, 539-40 (1943); *NLRB v. Louton, Inc.* 822 F.2d 412, 413 (3d Cir. 1987); *Leeds & Northrup Co. v. NLRB*, 391 F.2d 874, 879-880 (3d Cir. 1964).

In fashioning a remedy in a particular proceeding, the Board may draw on the knowledge and expertise it has acquired during its continuous engagement in the resolution of labor disputes and need not confine itself to the record of the dispute before it. This freedom has been accorded the Board at least since *NLRB v. Seven-Up Bottling Co. of Miami, Inc.*, 344 U.S. 344 (1953), when the Supreme Court sustained a formula for calculating back pay with these observations:

> It is urged . . . that no evidence in this record supports this back pay award; that the Board's formula and the reasons it assigned for adopting it do not rest on data which the Board has derived in the course of the proceedings before us. But in devising a remedy the Board is not confined to the record of a particular proceeding. 'Cumulative experience' begets understanding and insight by which judgments not objectively demonstrable are validated or qualified or invalidated. The constant process of trial and error, on a wider and fuller scale than a single adversary litigation permits, differentiates perhaps more than anything else the

> administrative from the judicial process. The relation of remedy to policy is peculiarly a matter for administrative competence . . . That competence could not be exercised if in fashioning remedies the administrative agency were restricted to considering only what was before it in a single proceeding.

*Id.* as 348-49 (citations and quotations omitted).

Furthermore, in shaping a remedy, the Board is not only concerned with recompensing the injuries suffered by particular protected victims of unfair labor practices, but also with devising the remedy that will best effectuate the public purposes expressed in section 1 of the Act, 29 U.S.C. § 151. These include, *inter alia*, the encouragement and protection of collective bargaining and the full freedom of association for workers. *Id.*; *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 193 (1941) (The Board "is the agency of Congress for translating into concreteness the purpose of safeguarding and encouraging the rights of self-organization.").

Kenrich's first argument is that the Board may not reinstate a supervisor because the Act does not protect a supervisor who engages in union activity. We need not tarry long over this contention. While it is uncontestably true that the Act does not protect a supervisor from being discharged for engaging in concerted activity, this does not deprive the Board of the authority to order the reinstatement of a supervisor whose firing resulted not from her own pro-union conduct, but from the employer's efforts to thwart the exercise of section 7 rights by protected rank-and-file employees. A legion of cases, with which we agree, so hold. *See, e.g., Delling v. NLRB*, 869 F.2d 1397 (10th Cir. 1989); *NLRB v. Advertising Mfg.*, 823

F.2d 1086 (7th Cir. 1987); *Howard Johnson Co. v. NLRB*, 702 F.2d 1 (1st Cir. 1982); *Belcher Towing Co. v. NLRB*, 614 F.2d 88 (5th Cir. 1980); *Russell Stover Candies, Inc. v. NLRB*, 551 F.2d 204 (8th Cir. 1977); *Pioneer Drilling Co. v. NLRB*, 391 F.2d 961 (10th Cir. 1968); *NLRB v. Electro Motive Mfg. Co.*, 389 F.2d 61 (4th Cir. 1968); *Oil City Brass Works v. NLRB*, 357 F.2d 466 (5th Cir. 1966); *NLRB v. Talladega Cotton Factory*, 213 F.2d 209 (5th Cir. 1954); *cf. Local No. 207, Int'l Assoc. of Bridge, Structural & Ornamental Iron Workers Union v. Perko*, 373 U.S. 701, 707 (1963) (Preemption of a state law claim by a discharged supervisor was justified where there was a sufficient probability that the Board could find a violation of the Act and where it "would surely be within the Board's power under § 10(c) to order the union to reimburse the supervisor for lost wages.").[5]

Alternatively, Kenrich argues that the case law enforcing Board orders reinstating supervisors does not pertain here because its unlawful motivation for firing Helen Chizmar was related to the union's organizational campaign, and that campaign succeeded despite her discharge. Since the reinstatement order is not necessary to restore the employees' organizational rights, Kenrich contends that it is punitive rather than remedial.[6] We reject

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[5] To the extent it can be argued that this question is ambiguously addressed by the statute, we believe the Board's long-standing interpretation of the Act as giving it the power to reinstate supervisors fired in violation of section 8(a)(1) is reasonable, and therefore owed deference. *NLRB v. United Food & Commercial Wkrs., Local* 23, 484 U.S. 112, 123 (1987).

[6] Kenrich did not dispute the propriety of the ALJ's recommendation that Helen Chizmar be reinstated before the

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this argument because it evinces an unduly cramped view of the section 7 rights belonging to Kenrich's rank-and-file employees and undervalues the coercive effect of Kenrich's wrongful conduct.

Under the teaching of *Seven-Up Bottling*, when an employer fires a supervisor in order to discourage the exercise of section 7 rights by protected employees closely related to the supervisor, the Board, based upon its experience, is entitled to infer in the absence of evidence to the contrary that the intended message was an

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Board; it limited itself to arguing that her dismissal did not violate section 8(a)(1) of the Act. Nor did Kenrich raise an objection to the Board's reinstatement remedy in its initial briefs to this court, again limiting itself to arguing that the Board's finding of a violation was erroneous. Only when asked by this Court to address the question of whether Helen Chizmar's reinstatement was consistent with the statutory exclusion of supervisors from the Act's protection did Kenrich argue that the remedy selected by the Board was inappropriate.

Though the Board has not objected that Kenrich has waived its argument by failing to raise it at the administrative level, *see* 29 U.S.C. § 160(e), we nonetheless must tread lightly lest we fault the Board and the ALJ for failing to address contentions that Kenrich simply did not make. Given the failure of Kenrich to argue to the Board that the reinstatement of Helen Chizmar could not be justified under the reasoning of prior Board precedent finding that reinstatement was an appropriate remedy for the unlawful discharge of a supervisor, we will not remand because the Board and the ALJ failed to explain why this case did not constitute an exception to its precedent indicating that reinstatement of an unlawfully discharged supervisor generally effectuates the policies of the Act.

effective one. Indeed, we do not believe one needs extensive experience with behavior in response to coercive tactics in the workplace to conclude that such a discharge must communicate to rank-and-file employees that the employer is willing to go to any lengths to crush section 7 activity. Moreover in this case, the Board did not need to go beyond the record for evidence of the effect of Kenrich's coercive conduct. The record demonstrates that Helen Chizmar's firing caused Catherine Chizmar to fear for her own job security despite her protected status.

As a result, Kenrich can argue only that while its discharge of Helen Chizmar initially may have had a coercive effect in the workplace, the union's success in the election provides adequate assurance that this coercive effect has been fully dissipated and requires no remedial action. But Kenrich's argument ignores the fact that the collective bargaining process is an ongoing one in which employees have repeated opportunities to exercise their section 7 rights; elections are followed by the negotiation of collective bargaining agreements, which in turn are followed by the day-to-day process by which disputes and grievances are resolved in the workplace. Thus, despite the union's success at the ballot box, many opportunities remained for the coercive impact of Helen Chizmar's discharge to take its toll on section 7 rights. Accordingly, the union's election success did not foreclose the possibility that the effects of that discharge would be ongoing.[7]

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[7] We reject the dissent's assertion that the Board's remedy of a section 8(a)(1) violation occurring in the course of an

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We believe it clear that the task of evaluating the likely rate of dissipation of the coercive impact of

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election campaign may not be sustained on the basis that it eliminates the effects of that violation on the exercise of employees' section 7 rights after a union victory. By its own terms, section 8(a)(1) makes it an unfair labor practice for an employer to restrain or coerce employees in the exercise of their section 7 rights. 29 U.S.C. § 158(a)(1). These rights include, *inter alia*, "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. It surely effectuates the Act to ensure that employees who have survived the rigors of an organizational campaign tainted by unfair labor practices and have voted in a union are not hindered in their ability to capitalize on this victory because of the lingering *in terrorem* effects of unlawful employer conduct during the election campaign. After all, section 7 does not just guarantee employees the right to vote for a union, it guarantees them the right to bargain collectively through that union.

The dissent's reliance upon *NLRB v. Raytheon Co.*, 398 U.S. 25 (1970), as supportive of its contrary position is flawed by its failure to point out that, in that case, the certified election that occurred after the issuance of the Board cease and desist order resulted in a majority vote *against* the union. *Id.* at 26. The Court held that the certification of this election did not moot the issuance of a cease and desist order because there was no showing by the employer that the unfair labor practices found by the Board would not recur and the "Act is not designed merely to protect a particular election or organizational campaign." *Id.* at 27. Thus, the employees were entitled to have an enforceable order prohibiting recurrence of the employer's unlawful conduct in subsequent elections. *Id.* at 27-28. Given the failure of the union to prevail in the election, there was no occasion for the Court to focus on the effect the preelection conduct might have had on the union's ability to effectively represent the employees.

Kenrich's conduct, like the task of evaluating its original potency, is one that Congress has entrusted to the Board and its expertise. In making that evaluation in a particular case, the Board may, if it chooses, rely on solely its experience in other like cases.[8] In this case, however, we

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[8] We, of course, acknowledge, as the dissent stresses, that Board dispositions of unfair labor practice charges, like other administrative adjudications, must be supported by substantial evidence. In most cases, the evidence of what transpired, if sufficient to support the finding of an unfair labor practice, will suffice to support the Board's decision respecting an appropriate remedy. Having determined the nature and extent of the violation, the Board is entitled to use its experience to predict the continuing effects of that violation and to decide what remedy will best ameliorate those effects. *NLRB v. Gissel Packing Co.*, 359 U.S. 575, 612 n. 32 (1969); *see also American Broadcasting Cos. v. Writers Guild*, 437 U.S. 411, 432 (1978) (the inquiry whether conduct would have a certain effect in the workplace "is . . . necessarily a matter of probabilities, and its resolution depends much on what experience would suggest are the justifiable inferences from the known facts . . . [t]his seems to us to be peculiarly the kind of determination that Congress has assigned to the Board"); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 799-800 (1945). This is essentially what happened in this case, where the Board applied its practice of reinstating unlawfully discharged supervisors to dissipate the serious coercive effects it believes such discharges have on the section 7 rights of affected employees.

"This is not to say that the Board may apply a remedy it has worked out of the basis of its experience, without regard to circumstances which may make its application oppressive and therefore not calculated to effectuate a policy of the Act." *Seven-Up Bottling Co.*, 344 U.S. at 349. In a case where the employer has introduced evidence showing that its case is materially different from those upon which the Board's experience is based, we must of course measure the reasonableness of

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believe the record reflects specific support for the conclusion that the effects of Kenrich's coercive conduct, if left unremediated, would be felt long after the election. During the September 1987 contract negotiations, the discharge of Helen Chizmar no doubt lent substantial

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the Board's decision against the record of the specific case we are reviewing. However, in doing so, we must give deference to the Board's expertise and enforce its order remedying that violation of the Act unless "it can be *shown* that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co.*, 319 U.S. 533, 540 (1943) (emphasis added).

Nor does the principle that the Board, in deciding upon a remedy, may apply its experience to the facts evidencing the violation mean that there are no remedy issues with respect to which record evidence beyond that supporting liability is necessary. The character of the issue determines whether additional evidence is required. Where the issue involves predicting the effects on the workplace of a particular unfair labor practice or a particular proposed remedy, reliance on Board experience will normally suffice. Obviously, the Board's experience in prior cases will not suffice if the issue is whether a certain employee was disabled during the period for which she claimed back pay. *See, e.g., NLRB v. Louton, Inc.*, 822 F.2d 412, 413-4 (3d Cir. 1987). Similarly, where, as in the *"Gissel* order" cases relied upon the dissent, the law imposes a threshold level of egregiousness that an employer's conduct must achieve before a particular remedy may be used, there must be substantial evidence that the employer's conduct exceeded the threshold, *See e.g., NLRB v. Permanent Local Corp.*, 657 F.2d 512, 521 (3d Cir. 1981) (in banc), *cert denied*, 455 U.S. 940 (1982); *NLRB v. K & K Gourmet Meats, Inc.*, 640 F.2d 460, 469-70 (3d Cir. 1981); *Frito-Lay v. NLRB*, 585 F.2d 62, 68 (3d Cir. 1978). Unlike the dissent, we conclude that the remedy issues contested before us are of such a kind that the Board could resolve them by applying its experience to the facts supporting liability.

credence to Salvatore Monte's threat to get rid of the whole Chizmar family. If that discharge is left unremedied, the fears engendered by that discharge and Monte's later threats will not be dispelled. Rather, a powerful message will be sent out to the supervisors and employees of Kenrich that the company may, without fear of redress, use family member supervisors as hostages. Kenrich is a family business and Monte testified that many of the company's supervisors have relatives among the rank and file. In the course of deciding whether to take some form of protected action, these employees will realize that if they vigorously exercise their legal rights, their close relatives who are supervisors may be fired with no possibility of recovering their job or lost wages. Conversely, supervisors who have relatives among the rank and file may feel that their job tenure rests on their ability to persuade their relatives to refrain from exercising their section 7 rights in a manner displeasing to Kenrich, knowing that Helen Chizmar lost her job because her relatives supported the union.

By reinstating Chizmar and compensating her for lost wages, the Board's order protects the section 7 rights of Kenrich's employees by assuring them that they need not fear that the exercise of their rights will give the company a license to inflict harm on their family. It also protects the employees by reassuring their relatives who are supervisors that they need not feel that their jobs are dependent on their ability to dissuade their family members from engaging in protected activity.[9]

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[9] The analysis and conclusion of the dissent are dependent on its assertion that Kenrich is "clearly entitled to discharge

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In this regard, the present case is essentially identical to the recent case of *Advertiser's Mfg. Co.*, 280 NLRB 1185

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Chizmar because of the conflict which arose as a result of her relatives' union activities." Typescript at 5 n. 1. Because the Board found as a matter of fact that Kenrich was not motivated by fears of a conflict of interest, it did not have occasion to consider the substantial question of whether the Act is violated when an employer who has tolerated a supervisor's family-related conflict of interest for a lengthy period of time decides that he will no longer tolerate that conflict because the supervisor's relatives have now unionized.

The Board is the body Congress primarily entrusted to strike the balance between provisions of the Act, *NLRB v. Local 103*, 434 U.S. 335, 350 (1978), and its decision in *Parker-Robb Chevrolet, Inc.*, 262 NLRB 402 (1982), indicates that it is not insensitive to the force of the Taft-Hartley amendments. While the dissent embraces an expansive view of the Taft-Hartley amendments' scope, the degree to which the Taft-Hartley amendments limit the Board's ability to proscribe and remedy supervisor-directed conduct that impinges on employees' section 7 rights is a matter of considerable difficulty and is not clearly answered by the Act. *See e.g.*, Comment, *Union Busters and Front-Line Supervisors: Restricting and Regulating the Use of Supervisory Employees During Union Representation Election Campaigns*, 135 U. Pa.L. Rev. 453, 473 (1987) (arguing that the legislative history to Taft-Hartley indicates that Congress' primary purpose was to prohibit supervisor unions, and that the supervisory loyalty doctrine extends to only those situations where supervisors act in a pro-union manner). If Kenrich discharges Chizmar upon her reinstatement and an unfair labor practice proceeding is commenced, the balance the Board strikes in that proceeding between Kenrich's right to loyalty from its supervisors and its employees' section 7 rights will be entitled to appropriate deference by this court.

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(1986). In that case, the Board ordered the reinstatement of a supervisor, Carol Hahn, who was fired to retaliate against her son Ronald, a non-supervisory employee, for his pro-union activities. The discharge occurred shortly after the union had won an election and was but one of a myriad of unfair labor practices committed by the company. The Board adopted the ALJ's finding of a violation and his recommendation that Hahn be reinstated with back pay:

> In *Consolidated Foods Corp.*, 165 NLRB 953 (1967) . . . and in *Golub Bros. Concessions*, 140 NLRB 120 (1962), the Board found that

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In such a proceeding, the Board will be able to consider whether a subsequent discharge is truly attributable to Kenrich's belief that Chizmar cannot effectively perform her responsibilities or whether the discharge is merely a remnant of hostility Kenrich feels towards its clerical workers because of their support for the union. Such a proceeding would undoubtedly entail an inquiry into the effect of unionization on Chizmar's responsibilities, and into Kenrich's apparent willingness to tolerate the conflict of interest Chizmar had when it came to enforcing Kenrich's work rules and in providing Kenrich with input about the appropriate pay for the clerical workers in a non-unionized workplace. Before unionization, for example, Chizmar presumably desired to see her family members avoid discipline and earn higher pay.

With respect to this case, we merely affirm the Board's determination that the reinstatement of Chizmar effectuates the policies of the Act. The fact that Kenrich may thereafter dismiss her for reasons that are lawful does not differentiate this from numerous other cases in which reinstatement has been ordered following a discharge for an impermissible reason.

> employers had violated Section 8(a)(1) by discharging supervisors because of the union activities of employees who were members of the discriminatees' families. The supervisors themselves had not engaged in any union activities. . . .
>
> The discharges of Carol Hahn and the supervisors in *Consolidated Foods* and *Golub Bros.* were not the result of any participation in union or concerted activities. On the contrary, the supervisory discharges resulted solely from the independent exercise of section 7 rights by employee relatives. Furthermore, the direct, severe, and unmistakable thrust of the act of the discharge was to interfere with those employee relatives in the exercise of their rights. The Board does not lack the power to protect those employees. Here, for instance, the impact of Carol Hahn's discharge on her employee son's union activities, magnified by other unlawful acts directed by the [Company] against Ronald Hahn, compels that he be protected by finding a violation and by ordering reinstatement and back pay for his mother.

280 NLRB at 1185-86 (emphasis added); *see also International Union of Operating Engineers, Local 400*, 265 NLRB 1316 (1982) (the coercive effect of a discharge of a family member, in this case from a janitorial services contract, upon employees cannot be fully eliminated without an award of full compensatory relief).

On petition for review to the Seventh Circuit, the company urged that firing a supervisor for her relatives' union activities cannot violate the Act, and that even if it may, a supervisor so discharged may not be reinstated. *See NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086 (7th Cir.

1987). The court rejected both arguments. As to the first, the court stated:

> To retaliate against a man by hurting a member of his family is an ancient method of revenge, and is not unknown in the field of labor relations. If the company had fired Ronald Hahn in retaliation for his election as chief shop steward, there would be no question that it had violated the Act. Instead, it fired his mother. If he loves his mother, this had to hurt him as well as her. An effective method of getting at him, a protected worker, it is barred by the statute.

*Id.* at 1088-89.

The court then addresses the question of the propriety of Carol Hahn's reinstatement in terms that are particularly apt to Helen Chizmar's discharge:

> The Board's remedy may seem problematic: forcing the company to reinstate a supervisor. The supervisors are supposed to be on the company's side in labor disputes. It . . . would be anomalous to force the company to reinstate a supervisor who was on the union's side. But as a matter of fact, Carol Hahn was, so far as appears, on the Company's side. She did not assist in her son's union activities. The company is not being asked to grasp a viper to its bosom. . . . Carol Hahn is not being reinstated so that she can help the union but so that Ronald Hahn and other protected employees will not be deterred from exercising their rights under section 7 by fear that if they do the company will try to get back at them in any way it can, including by firing their relatives. Of course, the company's action in firing Carol Hahn may have created bitterness and undermined her loyalty, but if so the company has only itself to blame.

*Id.* at 1089 (citations omitted).

The rationale of *Advertisers Mfg. Co.* applies with full force here. Helen Chizmar did not in any way aid the union's cause, and her reinstatement was not ordered to protect her right to participate in union activities. Rather, her reinstatement was ordered to demonstrate to the employees and supervisors at Kenrich that our labor laws do not permit employers to intimidate protected employees by using family member supervisors as hostages. If the Board were only permitted to remedy a relative's unlawful firing by posting a notice, there would be scant protection for employees seeking to freely exercise their rights.

Moreover, we believe, as did the Board in *Advertiser's Mfg.*, 280 NLRB at 1185, that the rationale for ordering make-whole relief is as strong in circumstances where a supervisor is discharged because of the protected activity of a family member as when a supervisor is discharged for failing to commit an unfair labor practice or for testifying before the Board. In situations where a supervisor has been discharged for failing to commit an unfair labor practice, reinstatement has been justified on the ground that it "dissipate[s] the effects of an unfair labor practice and restore[s] the status quo." *Talladega Cotton Factory*, 213 F.2d at 217; *see also Delling*, 869 F.2d 1397; *Howard Johnson*, 702 F.2d 1; *Belcher Towing Co.*, 614 F.2d 88; *Russel Stover Candies, Inc.*, 551 F.2d 204. By its very nature, a supervisor's refusal to commit an unfair labor practice cannot adversely affect the rights of the rank-and-file employees under her control, and reinstatement of the supervisor is not necessary to remedy an unfair labor practice that did not occur. Yet, the Board has thought it necessary to reinstate a supervisor fired for this reason in

order to ensure that the firing will not intimidate the employees' future exercise of section 7 rights. For example, the Board, as quoted in *Talladega Cotton Factory*, 213 F.2d at 214 n. 4, said this in ordering the reinstatement of supervisors discharged for failing to commit unfair labor practices:

> the discharges plainly demonstrated that the [Company's] action was part of its plan to thwart [the employee's] self-organizational activities and evidenced a fixed determination not to be frustrated by any half-hearted or perfunctory obedience from its supervisors. In our opinion, the net effect of this conduct was to cause non-supervisory employees reasonably to fear that the [Company] would take similar action against them if they continued to support the union.

Similarly, where a company fires an employee's close relative to punish the employee, that employee is likely to reasonably believe that the employer will go to any lengths to get rid of the union and that the next step in the scheme may be her own discharge. Reinstatement in this situation, as in cases where supervisors are dismissed for failing to commit unfair labor practices, serves to dispel employees' fears and concomitant reluctance to fully exercise their rights, by demonstrating that the law sets boundaries on employers' ability to engage in this sort of conduct with impunity.[10] *Virginia Elec. & Power Co.*, 319 U.S. at 541.

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[10] In addition, unless supervisors who refrain from engaging in unlawful conduct are assured that their refusal will not irreparably harm them, there would exist a strong incentive for

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IV.

In conclusion, the Board did not abuse its broad discretion to devise a remedy for Helen Chizmar's discharge that would effectuate a policy of the Act. The reinstatement and back pay order issued is reasonably calculated to dispel the intimidation caused by her firing. The Board's order will be enforced.

GREENBERG, *Circuit Judge*, dissenting.

I am unable to join in the majority's opinion because, in my view, the National Labor Relations Board has failed to produce substantial evidence to support its determination that Helen Chizmar's reinstatement with backpay would serve a legitimate remedial purpose under the National Labor Relations Act. In all cases, remedies calling for the reinstatement of supervisors should give us pause, as they compel the employer to revive an employment relationship which, under the Taft-Hartley amendments, 29 U.S.C. § 152(3) & (11), it has unfettered discretion to discontinue. Yet the majority holds that the Board may impose such remedies based solely on its

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them to acquiesce in their employers' request to commit unfair labor practices to the detriment of employees' section 7 rights. When a supervisor is fired to retaliate for her relatives' protected conduct, and when that firing does not serve its immediate purpose – such as defeating a union's organizational campaign – reinstatement also redresses the incentive structure created by the unlawful conduct by assuring supervisors that they need not convince their relatives to refrain from protected activity in order to avoid discharge.

expert judgment that the remedy will prove a benefit to the employees' protected concerted activity. In the alternative, it asserts that there is substantial evidence supporting the remedy in this case. I cannot agree with either of these contentions. As I feel strongly that the majority's extreme deference to the Board's broad remedial authority has caused it to approve a remedy which will do nothing more than recompense a supervisor for Kenrich's unlawful conduct, I respectfully dissent.

In approving the Board's determination that Helen Chizmar's discharge violated section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), the panel recognized that supervisor discharge cases are analytically difficult because they implicate two distinct policies of the NLRA:

> The issues, as framed by Kenrich, bring into sharp relief a difficult and recurring problem in the federal labor law, namely the extent to which the Board, in seeking to vindicate the statutory rights of rank and file employees, may limit an employer's otherwise unfettered right to discharge a supervisor. On the one hand, the [Taft-Hartley Amendments] excluded supervisors from the statutory definition of protected employees in order to preserve the employer's right to the undivided loyalties of its supervisory personnel. . . . On the other hand, the Board has long recognized, with court approval, that the Taft-Hartley amendments do not license an employer, on pain of discharge to compel a supervisor to serve as a conduit for unfair labor practices or take other action which 'directly interferes' with employees' statutory rights.

893 F.2d at 1477 (citations omitted).

In this case, the Board's liability determination was consistent with the Taft-Hartley amendments, as Kenrich failed to prove that it discharged Chizmar because of the conflict of loyalties she would experience if her relatives succeeded in unionizing. To the contrary, the record amply supported the administrative law judge's factual finding that Kenrich's "sole intent was to retaliate against Chizmar's relatives for attempting to unionize." 893 F.2d at 1480.

But Kenrich, in committing an unfair labor practice, did not forever forfeit its right under the Taft-Hartley amendments to demand the undivided loyalty of its supervisory personnel. In reviewing the Board's liability determination, we considered Kenrich's claim of a conflict of loyalties to be "highly suspect" because the discharge occurred before the union was in place. *Id.* at 1480. However, as the union prevailed in the election notwithstanding Kenrich's unlawful conduct, the Board's reinstatement order will restore Chizmar to a position where she inevitably will experience an actual conflict between her loyalties to Kenrich and to her relatives, so long as they are employed by Kenrich. Accordingly, the remedy phase of this case implicates the policies embodied in the Taft-Hartley amendments in a very real sense.

Thus, the situation here is distinguishable from that in *NLRB v. Advertiser's Mfg. Co.*, 280 NLRB 1185, *enforced*, 823 F.2d 1086 (7th Cir. 1987), because there, the discharged supervisor did not directly supervise her immediate relatives. 280 NLRB at 1198, 1202. The arguments advanced by Kenrich were unavailable to the employer in *Advertiser's Mfg. Co.*, which was confined to arguing that it discharged the supervisor because of her incompetence.

*Id.* at 1202. If in *Advertiser's Mfg. Co.*, the employer had substantiated its claim, no reasonable argument could be made that the discharge had anything to do with the employees' union activities. But here, in defending itself against the section 8(a)(1) charge, Kenrich specifically relied on the employees' union activities as the "but for" cause of Chizmar's discharge, as it asserted that the conflict of loyalties which necessitated Chizmar's discharge originated when her relatives supported the union campaign. Brief at 30-31. As the panel's decision indicates, *Advertiser's Mfg. Co.* provides substantial guidance as to the Board's analytical approach to the question of employer liability in supervisor discharge cases. 893 F.2d at 1477-78. However, the majority's reliance on *Advertiser's Mfg. Co.* is misplaced because the differences between the two cases are extremely significant insofar as the remedies are concerned.

According to the majority, Chizmar's reinstatement will serve a remedial purpose because it will

> assur[e] [Kenrich's employees] that they need not fear that the exercise of their [section 7] rights will give the company license to inflict harm on their family. It also protects the employees by reassuring their relatives who are supervisors that they need not feel that their jobs are dependent on their ability to dissuade their family members from engaging in protected activity.

Typescript at 18.

Assuming as true the majority's premise that the remedy is capable of producing these salutary effects on the work

place, I cannot accept its implicit assumption that Kenrich's unlawful conduct was the source of the conditions which the Board seeks to rectify.

What the majority fails to appreciate is that the advent of unionization in Kenrich's clerical staff in fact gave rise to a serious conflict of loyalties which would have justified Kenrich in discharging Chizmar in the absence of its violation of section 8(a)(1). The status quo ante which the Board seeks to restore includes the circumstance that the organizational activities of Kenrich's clerical staff placed Chizmar in the untenable position of supervising a small bargaining unit composed largely of her close relatives. It was Kenrich's unlawful intent which transformed its otherwise lawful discharge into an unfair labor practice.[1] If at the time of the discharge, Kenrich's sole intent had been to free itself of a conflict-ridden supervisor, there would be no 8(a)(1) violation. Yet if Kenrich had discharged Chizmar for lawful reasons, the employees could not help but realize that their exercise of their section 7 rights cost Chizmar her job. Chizmar herself understood that her relatives' organizational activities might jeopardize her job and, had Kenrich resolved to discharge her only if the union prevailed in

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[1] The panel had to make some very fine distinctions to resolve the liability question in this case. Kenrich clearly was entitled to discharge Chizmar because of the conflict which arose as a result of her relatives' union activities. 893 F.2d at 1480. It committed an unfair labor practice solely because its subjective intent when discharging her was to discourage her relatives from supporting the union. *Id.*

the election, might very well have attempted to dissuade them from pursuing the union. App. at 221-22, 235-37.

It might be argued that in reconstructing the status quo which would have existed but for the unfair labor practice, we must presume that, at the time of the organizational campaign, Kenrich did not view the conflict as sufficiently serious to discharge Chizmar, as it did not prove that the conflict influenced its discharge decision. But even accepting this premise, we cannot speculate that upon Chizmar's reinstatement, Kenrich voluntarily will tolerate a conflict of loyalties which, if anything, has become more acute during her absence.[2] In *Advertiser's Mfg. Co.*, the reinstatement order could restore a status quo ante whereby the supervisor's job security would be unaffected by her relatives' union activities. But here, even if Kenrich's conduct is irreproachable in the future, it is left with two choices, neither of which is free from difficulties under the Act. Either Kenrich's experience in this proceeding will inhibit it from exercising its rights under the Taft-Hartley amendments, or it will discharge Chizmar soon after her reinstatement, in which case the

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[2] Kenrich's tolerance for supervisor Thomas Washington's working relationship with his son does not necessarily indicate that it will be indifferent to Helen Chizmar's conflict of loyalties upon her reinstatement. Kenrich reasonably might distinguish between the degree of intimacy it will tolerate between supervisors and employees in its production plant and in its management offices, where supervisors might have greater accessibility to confidential information concerning Kenrich's position on union matters. Furthermore, the inferences we may draw from the Washingtons' situation are limited because there was a "level of supervision" between Washington and his son. App. at 493.

adverse impact on her relatives will be no less than it is now. The Taft-Hartley problem posed by Chizmar's conflict of loyalties is inescapable, as Chizmar hardly can dissolve the family relationships which gave rise to it. On this record, I cannot fathom how the policies underlying the Act will be served by restoring Chizmar to her position.[3]

It is no answer to say that the remedy need not meet the demands of a particular case. However that, in essence, is what the majority has said. As I understand it, the majority holds that, absent evidence to the contrary, the Board could infer from its past experience in cases of retaliatory discharges that Chizmar's reinstatement is the most effective means of ensuring that the employees will not be intimidated in future exercises of their section 7 rights and therefore, the remedy was within the Board's

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[3] I recognize that the Board has been entrusted with the task of "giv[ing] coordinated effect to the policies of the Act." *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344, 348, 73 S.Ct. 287, 289-90 (1953). However, I do not view this as a case which requires us to defer to the Board's expert judgment in harmonizing inconsistent labor policies. Without a doubt, if Kenrich, after reinstating Chizmar, decides that it cannot retain her as a supervisor because of her conflict of loyalties, the Board cannot prevent it from discharging her without running afoul of the Taft-Hartley amendments. But if a lawful discharge of Chizmar dampens her relatives' enthusiasm for the union, Kenrich cannot be held responsible. Absent proof of antiunion animus, the fact that an employer's activities may have the *effect* of discouraging union activity does not indicate that the employees' rights have been violated. Thus, Chizmar's reinstatement will not confer any lasting benefits on the employees but will severely limit Kenrich's rights under the Taft-Hartley amendments.

broad remedial authority. Typescript at 15. In other words, the majority maintains that the Board may apply generic remedies for particular types of unfair labor practices unless the party opposed to imposition of the remedy proves that the case warrants a different remedial approach.

I cannot subscribe to this conception of the Board's remedial authority. While the Board has wide discretion in fashioning remedies for unfair labor practices, it still must produce substantial evidence supporting its application of the remedy in a particular case. To be sure, *NLRB v. Seven-Up Bottling Co. of Miami, Inc.*, 344 U.S. 344, 73 S.Ct. 287 (1953), upon which the majority relies, could be interpreted to mean that in all cases, the Board is free to rely solely on its expertise when selecting remedies for unfair labor practices. However, we have not construed *Seven-Up Bottling Co.* so broadly and, in any event, I do not think that the Supreme Court meant to relieve the Board of its burden of proving the propriety of unconventional remedies which frustrate clear statutory objectives.

In *Seven-Up Bottling Co.*, an employer objected to the Board's application of a formula for calculating a backpay award to seasonal employees on the ground the formula did not account for seasonal variations in the employees' income. The Court accepted the Board's explanation that application of the backpay formula was reasonable because the formula reflected its past experience that alternative means of calculating backpay induced employees to waive their rights to reinstatement. *Id.* at 347-48, 73 S.Ct. at 289-90. As the case concerned the unlawful discharges of *employees*, the fact that the employees had sustained compensable injuries because of

the employer's unfair labor practices was never in dispute. The reinstatement and backpay orders, in themselves, were neither novel, unconventional, or untraditional and obviously rested within the competence of the Board, even though particular evidence as to the amount of backpay due was lacking.[4] In my view, *Seven-Up Bottling Co.* stands for the unremarkable proposition that the Board need not reaffirm the validity of its conventional remedies every time it applies them.

By its own terms, *Seven-Up Bottling Co.* does not require a court to defer to the Board's judgment when a reasonable argument can be made that the remedy is "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *Virginia Electric & Power Co. v. NLRB*, 319 U.S. 533, 540, 63 S.Ct. 1214, 1218 (1943). In *Seven-Up Bottling Co.*, 344 U.S. at 348, 73 S.Ct. at 290, the Court expressly stated that it did not intend to cast doubt on *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 61 S.Ct. 77 (1940), which held that the Board's authority under section 10(c) is limited to remedial as opposed to punitive measures.[5] The Court's

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[4] In cases of employee discharges, the statute expressly authorizes the Board to order their reinstatement with back pay. A supervisor's reinstatement with backpay, if permissible, lies within the nebulous terrain of other "affirmative action" the Board may take, in addition to issuing a cease and desist order, to "effectuate the policies" of the Act. 29 U.S.C. § 160(c).

[5] *Republic Steel Corp.* is particularly instructive here, as it rejected the idea that a remedy which, at best, has the effect of deterring future unfair labor practices is permissible under the Act. The Court stated:

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reference to *Republic Steel Corp.* would be meaningless if *Seven-Up Bottling Co.* was intended to circumscribe judicial review of the Board's remedies to the extent which

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> We do not think that Congress intended to vest in the Board a virtually unlimited discretion to devise punitive measures, and thus to prescribe any penalties or fines which the Board may think would effectuate the policies of the Act. We have said that 'this Authority to order affirmative action does not go so far as to confer a punitive jurisdiction enabling the Board to inflict upon the employer any penalty it may choose because he is engaged in unfair labor practices, even though the Board may be of the opinion that the policies of the Act might be effectuated by such an order.' We have said that the power to command affirmative action is remedial, not punitive. . . . We adhere to that construction.
>
> In that view, it is not enough to justify the Board's requirements to say that they would have the effect of deterring persons from violating the Act. That argument proves too much, for if such a deterrent effect is sufficient to sustain an order of the Board, it would be free to set up any system of penalties which it would deem adequate to that end.

311 U.S. at 11-12, 61 S.Ct. at 79 (citations omitted).

Insofar as the majority's holding rests on its assumption that the Board's remedy will deter Kenrich from attempting future retaliatory discharges of relative-supervisors, it is inconsistent with *Republic Steel Corp. Republic Steel Corp.* does not bar the Board from considering the deterrent effect of a remedy along with other factors relevant to the specific remedial task it faces. However, with the exception of cease and desist orders, which are expressly authorized by 29 U.S.C. § 160(c), the Board under *Republic Steel* may not rely on a remedy's deterrent value as its sole reason for applying the remedy in a particular case.

the majority believes it did, as *Republic Steel Corp.* clearly calls upon the courts of appeals to ensure that the Board does not exceed the limits of its remedial authority.

In cases since *Seven-Up Bottling Co.*, the Supreme Court has indicated that reviewing courts must test the Board's remedies to ensure that they have an adequate factual foundation and serve legitimate remedial purposes. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 900, 104 S.Ct. 2803, 2813 (1984) ("[I]t remains a cardinal, albeit frequently unarticulated assumption, that a backpay remedy must be sufficiently tailored to expunge only the *actual*, and not merely *speculative*, consequences of the unfair labor practice") (emphasis in original); *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 501, 98 S.Ct. 2463, 2473-74 (1978) (the Board's remedial orders are reviewable "for consistency with the Act, and for rationality, . . . [and] if supported by substantial evidence on the record as a whole must be enforced").

*Sure-Tan* is especially informative, as it rejected as speculative an unconventional remedy designed to afford unlawfully discharged employees some measure of relief in face of unique factual circumstances which made it highly improbable that the employees would receive any compensation through the conventional remedies of reinstatement and backpay.[6] *Sure-Tan* suggests that the Board

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[6] In *Sure-Tan*, the Court upheld the Board's decision, affirmed by the Court of Appeals for the Seventh Circuit, that an employer had violated sections 8(a)(1) and (3) of the Act, 29 U.S.C. §§ 158(a)(1) and (3), by reporting undocumented alien employees to the Immigration and Naturalization Service (INS)

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must adduce specific evidence supporting its imposition of remedies which are not expressly authorized by the

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in retaliation for their participation in a successful union campaign. 476 U.S. at 894-97, 104 S.Ct. at 2810-11. By the time the complaint was issued, the employees were no longer present in the United States, as they had accepted the INS's grant of voluntary departure as a substitute for deportation. *Id.* at 887, 104 S.Ct. at 2806. As a remedy, the Board ordered that the employees be offered reinstatement with backpay but left until subsequent compliance proceedings the question of whether the backpay should be tolled for any periods in which the employees were unavailable for work due to their absence from the United States. *Id.* at 889, 104 S.Ct. at 2807. The Court of Appeals modified the order to provide that reinstatement offers were to be conditioned on the employees' lawful presence within the United States. *Id.* In addition, the court decided that the employees should be deemed unavailable for work "during any period in which they were not legally entitled to be present and employed in the United States." *Id.* at 890, 104 S.Ct. at 2807-08. Recognizing that its modifications would effectively deprive the employees of any remedy under the Act, the court suggested that the Board award a minimum of six months backpay to compensate the employees for the losses of their jobs. *Id.* at 890, 104 S.Ct. at 2808. The Board accepted the court's suggestion when it modified its order upon remand.

The Supreme Court agreed with the Court of Appeals that any reinstatement offers had to be conditioned upon lawful presence within the United States, but reversed insofar as the orders provided for minimum backpay awards, in part, on the ground that the Board lacked the authority to impose the awards "in the total absence of record evidence as to the circumstances of the individual employees." *Id.* at 901, 104 S.Ct. at 2813. In doing so, the Court made clear that a backpay award must reflect the "actual, compensable injuries suffered

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statute. Here, the Board's remedy not only is unconventional but it thrusts upon Kenrich an employment relationship with a supervisor which the Taft-Hartley amendments say it may discontinue. Given the Supreme Court's insistence in *Sure-Tan* on specific evidentiary support for a remedy directly affecting statutory employees, I cannot read *Seven-Up Bottling Co.* as a blanket license for the Board to order the reinstatement of unlawfully discharged supervisors in the absence of evidence clearly demonstrating the need for this extraordinary remedy.

Moreover, the majority's shifting of the burden to the employer to produce evidence disproving the propriety of a remedy, which has been selected solely on the basis of the Board's expert judgment, is inconsistent with express provisions of the Administrative Procedure Act, 5 U.S.C. § 556(d), and the Labor Management Relations Act, 29 U.S.C. § 160(e), which clearly require the Board's findings to be supported by "substantial evidence." Furthermore, the majority unwittingly has cast a shadow on a legion of our cases which have examined whether the Board has met its burden of proof regarding its remedial orders. *Systems Management, Inc. v. NLRB*, 901 F.2d 297, ___ (3d Cir. 1990); *NLRB v. Louton, Inc.*, 822 F.2d 412, 414 (3d Cir. 1987); *United Oil Mfg. Co. v. NLRB*, 672 F.2d 1208, 1211-12 (3d Cir.), *cert. denied*, 459 U.S. 1036, 103 S.Ct. 446

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by the discharged employees." *Id.* Although the Court conceded the "probable unavailability" of any effective remedies for the unfair labor practices, it observed that "[a]ny perceived deficiencies in the NLRA's remedial arsenal can only be addressed by congressional action." *Id.* at 904, 104 S.Ct. at 2815.

(1982); *NLRB v. Permanent Label Corp.*, 657 F.2d 512, 521 (3d Cir. 1981), *cert. denied*, 455 U.S. 940, 102 S.Ct. 1432 (1982); *NLRB v. K & K Gourmet Meats, Inc.*, 640 F.2d 460, 469-70 (3d Cir. 1981); *Frito-Lay v. NLRB*, 585 F.2d 62, 68 (3d Cir. 1978). *See also Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491, 71 S.Ct. 456, 466 (1951). I need not belabor the point that the Board's opinion that a particular remedial order will effectuate the purposes of the Act is no substitute for substantial evidence.

The majority, however, does not rest on its holding that the Board's expertise, without more, is sufficient to sustain its remedial order. In the alternative, the majority insists that Helen Chizmar's reinstatement with backpay is appropriate because the record "reflects specific support," typescript at 17, for an inference that Chizmar's discharge had a coercive effect on protected employees which extended well beyond the organizational campaign which Kenrich unlawfully sought to thwart. Accordingly, the majority rejects Kenrich's argument that the remedy must be tested in the context of an organizational campaign but instead, asserts that the remedy will ensure the employees' ability to engage in the full panoply of section 7 rights without fear of retaliation.[7]

Insofar as the Board seeks enforcement of its cease and desist order prohibiting Kenrich from attempting retaliatory discharges of other relative-supervisors, I agree with the majority. *NLRB v. Raytheon Co.*, 398 U.S. 25,

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[7] In examining these contentions, I set aside my reservations about Chizmar's job security in the absence of the unfair labor practice. *See supra*, typescript at 4-6.

28, 90 S.Ct. 1547, 1549 (1970), held that a union's certification does not moot a proceeding to enforce a cease and desist order based on an employer's illegal preelection conduct. The Court reasoned that an employer's cessation of the specific illegal conduct which has given rise to the Board's liability finding does not provide adequate assurance that it will not resume such conduct in future elections. *Id.* But in *Raytheon*, the Court quite clearly was concerned with the Board's ability to remedy the particular type of unfair labor practice which gave rise to the statutory violation. *Raytheon* does not authorize judicial enforcement of remedies for preelection misconduct based on the Board's vague assertions that they will safeguard the employees' rights in later phases of the collective bargaining process. In other words, the Board cannot cite its need to deter a section 8(a)(5) violation as its rationale for a remedy involving a preelection violation of section 8(a)(1). The remedy must be specifically tailored to effectuate the specific statutory policy frustrated by the employer's unfair labor practice.[8]

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[8] This is not to say that a cease and desist order is the only type of remedy the Board may order in the case of a preelection violation. Quite clearly, if *employees* have been discharged in retaliation for their support of the union, the statute authorizes their reinstatement with backpay regardless of whether the union has succeeded in the election. In cases where the violation does undermine the union's support, the Board may order a new election or issue a bargaining order. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612-15, 89 S.Ct. 1918, 1939-40 (1969). But if the union succeeds and no employees have been discharged, a cease and desist order may be the only remedy the Board legitimately can impose.

As the remedy must, in some way, preserve the employees' election rights, I attach no significance to Monte's comment during negotiation of the collective bargaining agreement that he intended to get rid of the whole Chizmar family. The comment arguably would support a finding that Kenrich engaged in bad faith bargaining in violation of section 8(a)(5).[9] But Kenrich was not charged with bad faith bargaining and in any event, the comment has no bearing whatsoever on the coercive effect of Kenrich's conduct on the election process. The only other evidence cited by the majority is Catherine Chizmar's testimony that during the union campaign, Helen Chizmar's discharge caused her to fear that she might be fired if she supported the union. But Catherine Chizmar's fear of retaliation was not so overwhelming as to prevent her from openly supporting the union.

Instead, the record unequivocally demonstrates that Helen Chizmar's reinstatement with backpay could not serve any legitimate remedial purpose. Chizmar was terminated on May 29, 1987, and, on June 16, Kenrich offered to recognize the bargaining unit. After the employees rejected that offer, an election was held on July 2 in which the union prevailed. Following the union's certification on August 11, Kenrich and the union began negotiating a collective bargaining agreement. The majority's holding that it is necessary to reinstate Helen Chizmar to correct the effects of the unfair labor practice

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[9] The comment was made during negotiation of the plant workers' collective bargaining agreement and was the sole reference to the clerical workers. App. at 313-14.

defies common sense. Her reinstatement will be meaningless in that respect but will frustrate the policy of the Act with respect to supervisory employees.[10]

The majority concedes that the Board's remedial orders are reviewable for an abuse of discretion. I would hold that there has been a *per se* abuse of discretion by the Board where, as here, the record utterly contradicts the Board's assumptions about the need for a remedy which obviously will undermine a clear statutory objective. The reinstatement with backpay of a supervisory employee never should be regarded as a routine remedial practice. In this case, the Board's chosen remedy confers benefits flowing exclusively to a supervisor and as such, exceeds its remedial powers. *See Hi-Craft Clothing v. NLRB*, 660 F.2d 910, 918 (3d Cir. 1981) ("When only the supervisor's interests are at stake, . . . the intent of the Taft-Hartley Amendments is to deny jurisdiction to the Board."). While I appreciate the narrow scope of our review of the

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[10] I add that the majority does not even touch on how a backpay award to Helen Chizmar will benefit the employees except perhaps, in its generalized statements that the employees' rights cannot be effectively vindicated unless Chizmar is made whole. In the case of protected employees, backpay routinely is awarded to compensate them for actual economic losses they have sustained as a result of their unlawful discharges. *Sure-Tan*, 467 U.S. at 900, 104 S.Ct. at 2813. Here, there is not a shred of evidence that any of Chizmar's family members shared in her salary so that her loss of income caused any economic hardship to them. Of course, the Board does not assert that the remedy is needed to compensate the employees for any economic injury but alleges only that it will relieve the employees of the lingering coercive effect of Kenrich's unfair labor practice. I have doubts that backpay to Chizmar is a legitimate means of achieving this goal.

Board's remedial orders, *Louton*, 822 F.2d at 414, the majority's deference to the Board does not justify its abdication of judicial responsibility in this case. In these circumstances, I am constrained to dissent.

Circuit Judges HUTCHINSON and GARTH join in this dissent.

A True Copy:
Teste:
*Clerk of the United States Court of Appeals*
*for the Third Circuit*

## APPENDIX B

JD(NY) – 96 – 88
Bayonne, N.J.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

KENRICH PETROCHEMICALS INC.

and

Case 22-CA-15105

LOCAL 8-406, OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO

KAREN MCPARTLAN, An Individual

Case 22-CA-15258

BARBARA KNOROWSKI, An Individual

Case 22-CA-15319

*Robert T. McGovern, Esq. and Maria Balzano, Esq.*
Newark, New Jersey
for the General Counsel.

*William A. Behan, Esq.*
*(Norris, McLaughlin & Marcus)*
Somerville, New Jersey
for the Respondent

## DECISION

### Statement of the Case

STEVEN B. FISH, Administrative Law Judge.

Pursuant to charges filed by Local 8-406, Oil, Chemical and Atomic Workers International Union, AFL-CIO, herein called the Union or Local 8-406, and by Karen McPartlan and Barbara Knorowski individuals, in Cases Nos. 22-CA-15105, 15258, and 15319 respectively, the Director for Region 22 issued an Order Consolidating Cases, Second Amended Complaint and Notice of Hearing on December 8, 1987.[1] Said complaint alleges that Kenrich Petrochemicals Inc., herein called Respondent violated Sections 8(a)(1) and (3) of the Act by promising employees a wage increase, threatening employees with loss of benefits, more onerous working conditions, unspecified reprisals, pushing and assaulting an employee, changing employees status from part time to full time, withdrawing the use of a telephone from an employee, requiring employees to present medical verification for absences, causing employees Knorowski, McPartlan and Catherine Chizmar to be absent from work, discharging McPartlan, refusing to reinstate Knorowski, and by discharging Helen Chizmar its office manager because of the union activities of its employees, including relatives of Chizmar.

The hearing with respect to the allegations raised by said complaint was heard before me in Newark, New Jersey on January 6, 7 and 11, 1988.

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[1] All dates hereinafter are in 1987 unless otherwise indicated.

Briefs have been received from the parties and have been carefully considered.

Upon the entire record including my observation of the demeanor of the witnesses, I make the following:

## Findings of Fact

### I. Jurisdiction

Respondent is a Delaware corporation, with an office and place of business in Bayonne, New Jersey, where it is engaged in the manufacture and sale of resins, plasticizers, rubber chemical dispersions, and coupling agents. During the past year, Respondent has derived gross revenues in excess of $50,000 from the sale of its products directly to customers located outside the State of New Jersey. It is admitted and I so find that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

### II. Labor Organizations

It is also admitted and I so find that local 8-406 is a labor organization within the meaning Section 2(5) of the Act.

### III. Facts

#### A. Respondent's Operations

As noted Respondent is engaged in the manufacture and sale of resins, plasticizers, dispersions and coupling agents at its Bayonne, New Jersey location.

Respondent's production employees have been represented by local 8-406 for approximately 20 years. Respondent also maintains an office clerical staff consisting of secretaries, and clerks. This group of employees, which were under the direct supervision of office manager Helen Chizmar, consisted of seven employees as of May 1987. Of these seven employees, Chizmar was related to Barbara Knorowski (her sister), Karen McPartlan (her daughter), and Cathy Chizmar (her daughter in law). Additionally, Frank Sakowski, the father of both Chizmar and Knorowski, was a former plant employee of Respondent who organized the shop and served as the Union's first shop steward and negotiator for its first contract with Respondent.

Salvatore Monte is Respondent's president and a member of the Board of Directors. Erica Monte, Salvatore Monte's wife is a Vice President and a Board member as well. Charles Lucania is employed as Respondent's Vice President of operations.

**B. The Union's Organization of the Clerical Unit**

In May 1987 all of Respondent's clerical employees signed authorization cards for the Union at a meeting conducted at the Union's office. Shortly thereafter the Union sent a letter to Respondent received by it on May 22, demanding recognition and asserting that the employees had unanimously selected the Union to represent them.

Monte admitted that when be first received the Union's letter, he was "sort of shocked", and felt "a little betrayed." Then according to Monte, he "looked at the

players." Judy Kobryn had already given notice of her leaving, and Monte "decided that Linda Ferrano was going to be a confidential secretary, so she couldn't vote." Of the five remaining employees, he concluded that McPartlan and Knorowski being close relatives of the Union's first shop steward were not likely to change their minds about the Union. As Monte phrased it, I figured. . . . "the family is not going to back off from this position of going for the Union. I mean it's, it's in the family culture." Monte believed that he could be successful in persuading employees Michelle Bobb and Marge McNally from joining the Union, but was not sure about Catherine Chizmar. Although Catherine Chizmar was the daughter in law of Helen, she had expressed some disenchantment to Monte over the years about her mother in law, so Monte "wasn't sure which way she would go."

On May 26 the Union filed a petition at the Regional office seeking to represent Respondent's office clerical employees. Shortly thereafter, in early June, after a discussion with Cathy Chizmar, Monte became convinced that she would support the Union.[2] Thus, he claims that he felt that since the union was going to win an election, he may as well "get on with it, and acknowledge the Union."

Accordingly, on June 16, Respondent's attorney sent a letter to the Union, suggesting that a card count be conducted, instead of a Board election. Respondent agreed therein to recognize and commence negotiations

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[2] The substance of this discussion will be detailed more fully below.

with the Union, should it demonstrate its majority at the card count.

The Union subsequently rejected this alternative and insisted on an NLRB election, which was conducted on July 2. A majority of ballots were cast for the Union and a Certification of Representative was issued on July 10.

### C. The Discharge of Helen Chizmar

As noted, Respondent received the letter from the Union requesting recognition on May 22. On that same day, Lucania called Helen Chizmar and some other managers to his desk. He showed the letter from the Union to the managers and stated that the girls in the clerical staff had all signed up for the Union. He added that Respondent would be "arguing that the girls were coerced into this Union, but. . . . that would only buy time because it was a unanimous decision by the girls." At that point Lucania turned to Chizmar and said "here read the letter, but you probably know all about it already." Chizmar made no response.

In fact, Chizmar had know about the Union's organizing efforts, but had not been informed about it until May 21, the afternoon before receipt of the letter. At that time all the clericals approached Chizmar in a group, employee Judy Kobryn acting as spokesperson. Kobryn informed Chizmar that the employees had "voted for a union at Kenrich", and they felt that they owed it to Chizmar to tell her. Chizmar responded that she was shocked and asked why they did it. Kobryn replied that the employees hadn't received any salary increases for three years, they had no job security, and their pension

had been taken away. Kobryn then added, "there nothing you could do about it really, Helen, the letter should be here by tomorrow."

Chizmar admitted that she did not inform either Lucania or Monte on the 21 of May or thereafter the information about the Union that she had obtained. Chizmar testified that she toyed with the idea of calling Monte, but after discussing the matter with her husband, concluded that it wouldn't do any good to call, since the letter was going to arrive the next day. Moreover Chizmar felt that if she called, Monte would "think I'm involved in this."

On May 29, the very day Monte received the petition from the NLRB, Monte called Chizmar into his office at the end of day. Monte informed her that "we have to let you go, Helen. We just can't afford you anymore. You're making, we think we can get somebody for $20,000 less and that's what we plan to do", Monte handed her an envelope containing checks for salary, vacation, sick pay, plus one months severance pay. Chizmar said thank you. As she was walking out the door, Monte stated, "you did a good job."[3]

That same evening a going away party for employee Judy Kobryn was held at a restaurant near the plant. While at the bar, Knorowski and Jill Bernicker Respondent's Buyer and an admitted agent, discussed Chizmar's

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[3] The above description of the conversation is based on the straightforward concise and credible testimony of Chizmar. Monte "couldn't remember" whether he gave Helen Chizmar any reason for her termination at the time. I find this vague and imprecise response on this issue to be unpersuasive.

termination. Bernicker informed Knorowski, that Monte stopped her in the parking lot and notified her that he had let Chizmar go. Bernicker added that she inquired of Monte, "why did you do that?" According to Bernicker, Monte replied, "I couldn't keep her for financial reasons and I was not going to put up with any union bullshit."

Later on the other clerical employees of Respondent including Kobryn, McPartlan, Cathy and Helen Chizmar joined Bernicker and Knorowski and sat down at a table. Once again the subject of Chizmar's discharge was discussed, and Bernicker repeated to the group her exchange with Monte, as related above.

The above recitation of these discussions is based on the mutually corroborative and consistent testimony of McPartlan, Knorowski, and the Chizmars'. Bernicker for her part, admitted making the above observations about Chizmar's discharge, but asserts that these comments merely reflected her opinion. She couldn't recall whether she had spoken to Monte about the reasons for the discharge or whether she related to the employees what Monte had said about such action. I find her vague and disingenuous testimony on this matter not to be credible, and find as set forth above, the mutually corroborative testimony of the employees to be accurate.[4]

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[4] I note that Bernicker testified as to the basis of her opinion that Chizmar was fired because of the "union bullshit." She stated that Chizmar's three relatives worked there, and "I know I come from a close family, with three people doing something, I think I'd know about it. That was common sense to me."

Sometime in June, Monte had two conversations with Cathy Chizmar, during which the subject of Helen Chizmar's discharge arose. The first conversation occurred after Cathy Chizmar had expressed her concern to Lucania that her job might be in jeopardy, in view of what had happened to Helen Chizmar as well as McPartlan and Knorowski.[5] Lucania responded that Cathy Chizmar didn't have to worry about being fired.

A few minutes later, Monte called Cathy Chizmar into his office. After assuring Chizmar that he had no intention of discharging her, he asked why she felt that way. Chizmar mentioned Helen Chizmar's termination. Monte replied, "well, you know, I see what goes on with Helen Chizmar, what went on with Helen Chizmar. . . . You know I had to fire Helen because she couldn't do the technical end of the job. Monte then began discussing the Union situation.[6]

After lunch on that same day, Monte spoke to Cathy Chizmar in the parking lot. He said to her, "you know, Cathy, I have to watch what I say to you. You know, you're protected by law, I can't fire you." Monte then added; "you have know why I have to fire Helen Chizmar, because I couldn't afford her . . . and because no matter what I did for her she was never happy."

Monte testified on behalf of Respondent, that he made the decision to terminate Chizmar, and set forth his alleged reasons for his action. Monte testified that he

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[5] As will be detailed below, Respondent had just changed the hours of McPartlan and Knorowski to full-time.

[6] This portion of he conversation well be detailed below.

discharged Chizmar because he felt that the appearance of the Union created a conflict of interest between Chizmar's obligations to management and her family loyalties. As Monte phrased it, "I had a conflict of interest that she was going to represent me as management managing an office. There was a fox watching the chickens. You can't have a fox watching the chickens, that was the conflict. Can't have it."

Monte explained further that in his view there was no way Chizmar could properly represent him managing an office full of relatives. He pointed out, "how could she sit across the bargaining table as a mother of a daughter and daughter in law and insist on representing managements rights." He added that he would not feel comfortable discussing bargaining strategies with Chizmar, where he felt she would then discuss these matters with her relatives.

As support for his belief that such a conflict would occur, Monte points to a history of complaints that he has received over the past few years, that Helen Chizmar had shown favoritism to her relatives in the performance of her supervisory responsibilities. According to Monte, he had been receiving complaints from employees directly, and through his wife Erica, since April of 1986, accusing Chizmar of giving preference to her relatives in job assignments and other personnel matters. In fact, Monte asserts that these problems caused some of his employees to quit Respondent's employ, including his private secretary, Donna Matta in April 1986.[7] Moreover, Monte

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[7] Linda Ferrano, Matta's replacement as Monte's secretary, testified herein, and confirmed that she believed that Helen

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further asserts that later on in 1986, he spoke to Cathy Chizmar, who at that time had not yet become Helen's daughter in law. Cathy Chizmar (at that time Strifilino) allegedly confirmed to Monte that Helen Chizmar was playing favorites in her assignments, and in fact referred to Helen Chizmar as a "no good two faced phony."

According to Monte these kinds of complaints and problems about Helen Chizmar continued from April 1986, to the time that he discharged her. Monte admits that he never spoke to or confronted Chizmar with these allegations that were made about her, because he claims that Helen "would deny it", and because, "Helen had been with me such a long time that I still viewed Helen as management, and these were just staff people bitching."

Monte claims that as a result of these complaints, he began to think about terminating Chizmar because of the divisiveness that she was causing in the office, but he did not do so because "the job was getting done." As Monte testified "I mean they got the letters out, they got the orders in, everything was being done, so it is office crap, let it go." Additionally Monte testified that he felt that he needed "a real bonafide reason" to fire her, and that "if someone has been with me a while it takes a lot to get me to fire somebody."

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Chizmar gave her assignments that she thought should have been given to other employees, including Chizmar's relatives. She also confirmed that she had on various occasions since April of 1986, registered complaints about her beliefs in this regard to both Sal and Erica Monte.

According to Monte, when he received the Union's recognition demand on May 22, "in my mind at that point she was pretty much gone." Monte continued, "because I cannot conceive of her receiving that notification and having that clerical unit form without Helen knowing about it. Just impossible."

**D. The Change in hours for Knorowski and McPartlan**

On June 1, the next work day after Chizmar's discharge, Monte notified McPartlan and Knorowski that starting the next pay period, their previous part time status would end, and their hours would be 8:30 a.m. to 5:30 p.m. Monte informed then that he didn't want any more part time employees working for Respondent.

Knorowski began her employment at Respondent in 1962 as a full time employee, and she continued on that basis until 1967, when she left the job to have children. She returned to work in 1972 on a consultant basis pursuant to a request by Monte, and she left to have another child in 1974. She returned to work in 1975 and began working four hours a day. In 1979 when her smallest child began school, her hours were increased to six hours a day (8:30 a.m. to 2:30 p.m.), which continued until June 1 1987, when the change was made to full time by Monte. Over the years Knorowski had mentioned to both Lucania and Mr. Atlas the controller, that she needed to work part time because of her family situation.

Sometime in 1986, Lucania asked Knorowski if it was possible for her to work more hours. Knorowski replied that she couldn't do so at the present time. Lucania replied O.K.

McPartlan began her employment with Respondent in 1975 in the summer, and thereafter worked flexible, part time hours while she was attending high school and college. She left in 1980 to have children. In 1983 Monte requested that she return to work on an as needed basis.

She continued to work in that manner until May of 1984, when she met with Lucania to discuss becoming a regular employee.[8] During this meeting it was agreed that McPartlan would become a regular employee, eligible for benefits, but with a flexible part time schedule of a minimum of 20 hours per week. Lucania at the time told McPartlan that Respondent wanted full time employees and that eventually wished to have her work full time. She replied that she was only capable of working 20 hours per week because of her small children, and would only agree to work these hours. Subsequently, at various times, both Monte and Lucania would ask her if she could work full time hours, but she declined, reminding them that she could not do so due to her children. Lucania and Monte replied okay, but asked if she could put in more hours on occasion. She would comply with these requests when she could do so, and was able to put in more hours when she could made accommodations for her children.

On September 24, 1986, Lucania on behalf of Respondent issued a memo entitled, *Personnel Policies and Secretaries*. The memo includes various items such as lunch periods, vacations, holidays, as well as an announcement

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[8] Previously she had been paid "off the books."

that all employees are to work a regular schedule with no individual flex-time permitted.

According to Monte, this portion of the memo was generated by complaints to him from Dr. Sugarman, for whom McPartlan acted as secretary. He allegedly complained to Monte at that time that he never knew when McPartlan was going to be around. Thus Monte felt that he would eliminate the prior practice of flex-time hours.

According, on September 30, 1986 Helen Chizmar in response to Lucania's memo, issued a new schedule setting forth the hours of certain employees.

This memo indicated hours for Maryellen Wierzbicki of 8:30 a.m.to 5:00 p.m., with one hour lunch, Knorowski of 8:30 a.m. to 2:30 p.m. with no lunch, and for McPartlan 9:00 a.m. to 3:00 p.m. with no lunch. This represented no change in hours for Knorowski, as she had previously been working this same schedule. The record does not disclose what Wierzbicki's schedule had been prior to this memo being issued. McPartlan had been working a flexible schedule, guaranteeing Respondent 20 hours per week, but in reality she would usually work more hours, averaging close to 30 hours a week.

The decision to change the hours of McPartlan and Knorowski from part to full time was made by Monte, without consultation or discussion with Lucania, Respondent's Vice President of Operations.[9]

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[9] I note that Lucania appeared to be responsible for personnel matters such as this type of action. Indeed, the memo sent out by Respondent on September 24, 1986 dealing with

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Monte testified that he eliminated the part time hours of Knorowski and McPartlan, because their part time status had been viewed "by everyone" as another example of favoritism for Chizmar's relatives. Moreover, he had always wanted to have all employees working full time. Therefore since he had terminated Chizmar, there was no longer any "obstacle" to his carrying out his desire to eliminate the use of part time employees.

### E. Monte's Efforts to Dissuade Employees from supporting The Union

As set forth above, upon receiving the Union's demand, Monte after looking "at the players" calculated that McPartlan and Knorowski as close relatives of the Union's first shop steward, would not "back off" from supporting the Union. Since he had concluded that Ferrano would be his confidential secretary, and Kobryn was leaving, this left Cathy Chizmar, Bobb and McNally as employees who Monte felt could be dissuaded from supporting the Union.

After consulting with his attorney as to what he could say, Monte called a meeting of these three employees on June 3. Also present were Lucania, Erica Monte, and Eric Spielgelhalder.[10]

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various personnel policies such as vacation, lunch, overtime, holiday, plus a new rule eliminating flexible hours, was issued by Lucania.

[10] Spielgelhalder was Respondent's founder, and the father of Erica Monte, but whose role in running the Company had been passed on to Monte.

Monte began the meeting by announcing that he was recording the meeting, upon advice of counsel, so that nothing he says will be misinterpreted. He then mentioned that the law allows him to designate a confidential secretary, and he had chosen Linda Ferrano for this position. Therefore she will not be participating in the election process. Thus the election will involve the three employees present, plus McPartlan and Knorowski.

Chizmar asked, "shouldn't they be included in the meeting?" Monte replied that it was his right as a manager to talk to who he wants to.

Monte continued by stating, "I can't make any threats or any promises under federal law; that's the law. I can't threaten you, I can't promise anything because the process has to go forward without any encumbrances on your free will or your right to make your own decision, that's the law, so my hands are tied."

Monte added that "I have to ask you and I want you to know that I want you to vote against the Union."

Monte then proceeded to remind the employees of the austerity program that Respondent was going through, emphasizing the economic problems, calling of bank loans and the fact that management officials including Monte himself had taken a 20% pay cut.

During the course of the meeting Monte made two references to the possibility of Respondent granting its employees a 7% wage increase.

He prefaced the first reference to such a possibility by mentioning that Respondent was not showing a profit yet and were just about breaking even.

Monte then continued;

> But its been my goal all along that once we hit 1.2 million dollars a month in 1987, I was going to give everybody a 7 percent raise and you can vouch it by asking Erica, you can ask Charlie, its a figure I have had all along. I even told you that once Cathy a couple of months ago that I had a 7 percent raise in mind. Remember you said you needed a raise?

Chizmar then responded, "Yea, you didn't use, (sic) all you said to me was yea I need one too. That's all you said to me."

Monte answered "well I was trying to let you know I need one too. I would like to institute some raises in the Company."

At that point Monte returned to discussing problems Respondent was having with its bank loans, and referred to the fact that he had recently hired new salesmen in order to increase sales.

He then returned to discussing the raise question;

> So I was planning to give you guys a 7 percent raise once the sales hit 1.2 million dollars a month in 1987. That's been my plan and that's been my goal, even ask Erica I've been saying it all along, when we hit 1.2 million I'm going to gave the people 7 percent, we never hit. We never hit, the last time we hit 1.2 million was April of 86, and that was after coming off of this disastrous March and that's the truth and that's what I had in mind and that's what I still have in mind.
>
> So that is not a promise nor a threat that is merely a statement of fact. I have to talk this way.

> I'm asked each of you personally to vote against the union. If what I'm telling you isn't true and it's bullshit then you can always vote the union later. But what I'm telling you is the truth if you don't believe that and you find that I'm not telling you the truth than you can make that judgment and you can always vote a union that's your, right. But I have never lied to anybody here as far as I know consciously ever.
>
> I don't say one thing and do another. I don't promise unless I can deliver. That's my nature I'm a very honest person. Okay.

Monte proceeded to again ask for a vote again the Union, and again emphasized "like I said I can't promise, I can't threat (sic) I just stated the facts of the position of the Company."

Monte concluded the meeting by repeating that Ferrano was going to be his confidential secretary and "she has nothing to do with this whole process, so you don't have to worry about whether she is going to go for this side or that side and everybody's got to play games because I have the right and that's the law."

Finally, Monte asked the employees if they cared to join him for lunch. They all declined his invitation.

According to Respondent's witnesses, Monte and Lucania, the decision to grant a 7% wage increase when sales reached 1.2 million per month, was made by management in August 1986. Moreover they contend that this decision was communicated to employees and management at various meetings and in individual conversations over the succeeding year, and well before the Union's organizing. They further assert that the matter was "common knowledge" around the shop, to the extent that

employees would constantly be checking the sales book which was available on Cathy Chizmar's desk to see if the threshold was being reached.

Helen Chizmar one of General Counsel's witnesses, essentially corroborated the testimony of Lucania and Monte that it was "common knowledge" around the shop that employees would be receiving a raise when sales hit $1.2 million per month and that employees would come by the sales book, look at it, and say "ok I can't wait till we hit $1.2 million."

Lucania specifically testified that he personally notified a number of employees about this matter, including Kobryn, Wierzbicki, McNally, and Knorowski. Knorowski although a General Counsel witness did not deny Lucania's testimony in this regard, and furnished no testimony on this subject.

Cathy Chizmar was the only General Counsel's witness to testify about this issue, and she denied knowing anything about Respondent's alleged announcement that a raise would be given when sales reached 1.2 million. In fact she asserts then when she previously asked Monte about a raise, he did not tell her about such a scenario and merely responded that he "Monte" would like a raise also.

I credit Respondent's witnesses with respect to this issue, and conclude that Respondent had formulated and disclosed to its staff well before the Union's appearance, its position that a 7% raise would be granted to employees when sales reached 1.2 million per month. I rely particularly on the testimony of Helen Chizmar, General Counsel's witness and alleged discriminatee who

substantially corroborated the testimony of Lucania and Monte in this area. Moreover I note that McPartlan and Knorowski two other of General Counsel's witnesses who testified in other matters, furnished no testimony in this area, and did not deny the assertion that the proposed raise was "common knowledge" in the shop.[11]

As detailed above, Monte called Cathy Chizmar into his office after being told that she had expressed fears of being terminated in view of the recent treatment accorded to her relatives. After assuring Cathy Chizmar that he had no intentions of firing her, and explaining why he had fired Helen Chizmar, Monte began to discuss the Union.

He said to her;

> If you vote in a union you have to start from scratch. No benefits, no salary, no vacations . . . . Both sides have proposals and if you don't like our proposals you have the right to go on strike. . . . I don't know if you know it, but if a union ask you to go on strike, you have to go on strike. And if you go on strike I have the right to replace you and that's the only time I can see somebody sitting at your desk.

Monte then asked Chizmar, "how would you like to punch a time clock?" Chizmar responded, "Sal, it wouldn't bother me."

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[11] Indeed Lucania testified without refutation that he told a number of employees specifically Knorowski, among others, about respondent's policy in this regard.

Monte concluded the conversation by saying that the "Union doesn't really know how to negotiate for an office staff."

As is also detailed above, Monte spoke to Cathy Chizmar in the parking lot, later that same day, and again discussed Helen Chizmar's discharge. After completing his remarks about that subject, Monte continued, "you know what the worst thing that can happen to Kenrich, is the union would come in, because, you know I'm the President of the company and I know what's best for the company."

Chizmar responded that all the employees had agreed "together as a whole" to join the union, and "there was no leader."

### F. The Events of June 18

Monte testified that he believed that his efforts to persuade Cathy Chizmar to withdraw her support for the Union were not successful. Thus, as noted above he authorized his attorney to send a letter to the Union dated June 16, proposing a card check.

On June 14, Monte's father died in Florida. While Monte was in Florida for the funeral, he received reports from his wife, that employees in general and Knorowski in particular, had been attempting to persuade Linda Ferrano to support the Union. These reports particularly annoyed Monte, since he contends that he thought the matter had been resolved by his sending the letter to the Union and that it would be agreed that Ferrano was his confidential secretary. Monte admitted in reference to

Knorowski's attempts to persuade Ferrano to join the Union, "that really, that frosted me."

Thus on June 18, Monte arrived at Respondent's office at about 8:30 a.m. Knorowski approached Monte as he was walking towards her in a narrow corridor,[12] surrounded by file cabinets on both sides. Knorowski reached out, clasped Monte's hand, and offered her condolences on the death of his father. Monte pushed her hands away from his, thereby knocking her into the filing cabinet. He said to Knorowski, "I don't want your fucking condolences." Knorowski then came off the cabinets, and Monte bumped her shoulder with his shoulder as he continued walking, and Knorowski again was knocked against the filing cabinets. Knorowski began to cry hysterically, and claimed, "he hit me, he hit me."

Monte admitted that he rejected Knorowski's condolences because he felt that her sympathy was not expressed sincerely in view of her union activities while he was away mourning his father. As Monte expressed it, "the so called application of sympathy flew in the face of her behavior pattern while I was away bereaving my dad."

Knorowski at that point went back to her desk, still crying and holding her side. Cathy Chizmar asked Knorowski what happened, and she replied "Sal pushed me against the filing cabinet." Knorowski also informed Chizmar that she had offered her condolences to Monte,

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[12] The corridor is 35 3/4 inches wide. It is not disputed that it is not possible for two people to pass each other in this corridor, without one of the individuals stepping aside.

and he had pushed her against the filing cabinet and said, "I don't need your fucking condolences."

Chizmar told Knorowski to calm down, and tried to contact Bob McLean the shop steward for the plant employees. At that point Monte came into the office and seeing Knorowski still crying, said to her, "what the hell's wrong with you." Chizmar then asked Monte why he had pushed Knorowski. Monte replied to Chizmar, "it's none of your fucking business." Chizmar then told Monte that he shouldn't have pushed Knorowski, and accused him of being a hypocrite and a bastard.

Monte then came right up to Chizmar's face and said "if you don't like the way I run my fucking business, get the fuck out, I don't need you." With that Monte violently pushed a three tier bin filled with papers off her desk onto the floor causing the papers to go flying.

Monte then proceeded down the hallway about fifteen feet away from Knorowski, who was at her desk and still crying. Monte turned to Knorowski and said to her, "why don't you cry somewhere else you, fucking cunt."

McLean the shop steward then entered the area. Chizmar informed him that Monte had pushed Knorowski up against the filing cabinets and had called both Knorowski and Chizmar some rather foul names. McLean approached Monte and asked him what happened. Monte replied, "you know what happened, It's got to do with this fucking Union." McLean requested that Monte take it easy, and spent some consoling Knorowski, who was still sobbing. He then went out to call Al Ferrante the union president.

At that moment Monte came back into the office and said to the employees, "you don't know what your getting yourself into by bringing in a fuckin union."

Meanwhile McLean called Ferrante from the production office, and reported what had occurred. Ferrante advised him to take Knorowski and Chizmar out of the building. Ferrante advised McLean that he would call Knorowski himselfs and make that suggestion.

Ferrante then called Knorowski at her desk. As she was explaining to Ferrante what Monte had done, Monte went over to Knorowski, pointed his finger in her face, pounded on the desk, and yelled two or three times; "Are you on a fucking personal phone call?" Finally Knorowski looked up and said no. Ferrante who heard Monte's screaming, advised Knorowski that in view of Monte's yelling and screaming it would be best if she and Chizmar leave the premises.

Knorowski got off the phone, and asked Monte, "why did you do that to me?" All I said to you was I'm sorry for your father passing away." Monte replied that he couldn't grieve right for his father with all the "fucking union bullshit that was going on."

Monte then walked into his office. Knorowski informed Chizmar that Ferrante had advised that in view of Monte's behavior, that they both should leave the premises. Chizmar agreed, particularly since her heart and her head were pounding and she had suffered from high blood pressure for five years. She felt that "there was no way I could sit in that office after Sal was in such a rage, all day long."

Knorowski and Chizmar notified Lucania that they weren't feeling well and were going home. Lucania replied, "you have to do what you have to do."

As Knorowski and Chizmar were leaving, Monte came out of his office and confronted Chizmar. He screamed at her, "where the fuck are you going?" Chizmar responded that she was going home and that she didn't feel good. Monte answered, "you're not fucking sick." Chizmar replied that she was sick and added "I don't have to stay here and take your abuse." Monte concluded by saying, "I'm telling you right now, if you go home, I'm not paying you for the fucking day." Knorowski and Chizmar left the premises without further incident or discussion.

Later on that same afternoon, shortly before 2:00 p.m., Lucania received phone calls from employees NcNally and Bobb. They each informed Lucania that they were sick and were not returning to work from lunch.[13] That same afternoon, McNally called Ferrano on the phone and advised her that someone from the Union had suggested that all the clerical employees go home because of the events that had occurred earlier in the day. Ferrano did not go home early however, and stayed until the end of the day. She did not report her conversation with McNally to anyone from management.[14]

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[13] McPartlan was on vacation during this week.

[14] The above description of the events transpiring on June 18 is derived from a synthesis of the credited testimony of Knorowski, Chizmar, Monte, Lucania, Ferrano and McLean.

**G. The Removal of McPartlan's Telephone**

As noted, McPartlan was on vacation during the week including June 18, the date of the incidents described above involving Monte, Chizmar and Knorowski. McPartlan returned to work on June 22. On her next working day, June 23, she discovered that the handset from her telephone was missing. She asked her coworkers and Lucania if they knew anything about why her receiver was missing. They did not, but Mr. Dakwala, the plant manager gave her a spare which she plugged into her phone.

A few minutes later, Monte came over to her and said, "I'm the one who pulled that telephone out. I don't want you to have a phone. Pull that thing out." McPartlan protested that she needed a telephone to do her work. Monte replied that if she needed to make calls for business such calls could be arranged, and repeated his instruction that she pull the phone out. Monte walked out.

McPartlan tried to call the Union, but Monte walked back in, so she hung up the phone. Monte stated, "I told you to pull that thing out." McPartlan again insisted that she needed the phone for work, and added that if there is a fire, she would need a phone to call for help. Monte left and came back again and once more ordered McPartlan to remove the phone. She refused. Monte then reached over and yanked out the receiver himself.

McPartlan at that point went to Lucania and complained about Monte removing her phone. She told him that she needed the phone and it was a fire hazard. She added that she was also afraid of being assaulted.

Lucania replied that no one is going to assault her. McPartlan responded, "well it happened last week." As for the fire problem, Lucania responded that it was his responsibility as Vice President of operations to notify the fire department in the event of a fire.

McPartlan left Lucania's office and called the Union on the pay telephone. She reported the incident to a Mr. Demski of the Union, and advised him that she was upset and was "afraid to sit back there without a telephone." Demski asked if she had any sick time. She replied that she did. Demski suggested that if she was upset, she should go home.

McPartlan then went to see Lucania, and advised him that she was taking a sick day, that she was upset and couldn't work, and that she was going home. Lucania replied, "you got to do what you got to do."

As she was heading out the door, McPartlan encountered Spiegelhalder. McPartlan complained to Spiegelhalder, that "it was a disgrace what's going on around here." She added that she was not going to "sit back there without a phone", and mentioned that she was not going to be the next person assaulted. When Spiegelhalder appeared puzzled by her remarks, McPartlan told him to go into Monte and "ask him what he did to my aunt last week." Lucania then took Spiegelhalder into the office.

As McPartlan was walking through the front office, Erica Monte instructed McPartlan to make sure and bring a doctor's note when she returns. McPartlan said okay and left the premises.

Monte testified that he made the decision to remove the telephone privileges from McPartlan. He contends, "for a period of days immediately preceding that Karen was making extensive use of the telephone . . . . and obviously not company business. . . . . I just felt that she was abusing the privilege of the phone." As to the basis for his belief that McPartlan was "abusing the privilege", Monte testified that he was informed at the dinner table by his daughters and his wife that they observed her making what appeared to them to be personal calls. They allegedly asserted that with respect to McPartlan, they observed her whispering and that she would hang up the phone when they tried to find out if the call related to business.[15] Monte admits that he did not know who McPartlan was talking to on any of these calls, but claims that he thought she was talking to her mother, to the Union, or to Knorowski or Cathy Chizmar.

It is also undisputed that Respondent did not have any rules or policies about using the phone for personal calls, and that neither Monte nor any management official ever spoke to McPartlan or warned her about using the phone for personal calls.

McPartlan's phone was returned without explanation by Monte around July 9.

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[15] Monte had three daughters who worked part time at Respondent. Neither Erica Monte nor any of Monte's three daughters testified herein.

**H. Respondent's Requirement that Employees be examined by a Company Physician**

As outlined above, Chizmar and Knorowski left Respondent's premises after their "confrontation" with Monte on June 18. On June 19 and June 23, Knorowski's husband called Lucania, notified him that Barbara was ill, under a doctor's care, he didn't know when she would be returning to work and that a doctor's note would be mailed in.

Chizmar was examined by her own doctor on June 19. She sent a letter to Respondent dated June 19, with a note from her doctor attached. The letter indicated that on June 18 she had become "ill and had to leave the office due to the unprovoked and violent conduct of Salvatore Monte."

The letter added that her condition did not improve on Friday, June 19, and she had to seek medical attention.

The letter from her doctor certified that he examined Chizmar on June 19, and that she is unable to work through Thursday June 25, "due to an acute exacerbation of her hypertension and an anxiety related situation."

McPartlan as also noted, left work after her "confrontation" with Monte with regard to her telephone on June 23.

On the same day, Respondent sent mailgrams to Chizmar, McPartlan, and Knorowski, followed up by clarifying latter, dated June 24.

In substance, these correspondences indicated that Respondent did not accept the employees claims of illnesses, and that it believed that they were engaged in "concerted activity against Kenrich."

Accordingly, the employees were told that they will not be paid for any lost time unless they were examined by the company doctor, Dr. Richard Williams, on Thursday, June 25 at 2:45 p.m. at his office.

On June 23, Lucania sent a telegram to Dr. Williams, asking him to examine the employees to "verify their alleged continuing illness." The telegram continues, "we are currently involved in an attempt to unionize our office clerical staff and we believe these two[16] individuals are involved in a job action to seriously hamper company operations."

McPartlan reported to work on June 25, without having received any correspondence from Respondent about the appointment. She brought, as she had been instructed by Erica Monte, a note from her own doctor. This note indicated that McPartlan was examined by him, her condition was diagnosed as "acute gastroenteritis"[17] and that she could return to work on June 25.

She gave the note to Erica Monte when she arrived. Ten minutes later Lucania handed her a copy of the letter described above, which had been sent to her concerning

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[16] The telegram only referred to Knorowski and Chizmar, since McPartlan apparently had not at the time as yet been included in the group that Williams would examine.

[17] McPartlan admitted that her symptoms i.e. "diarrhea" did not develop until after she went home on June 23.

the doctors appointment on that afternoon. McPartlan questioned why she had to see a company doctor, since she had brought in a doctors note, and was ready to work. Lucania replied, "you got to go the doctor." McPartlan said O.K. and went to see the doctor as ordered.

Each of the three employees was examined by Dr. Williams on June 25. He gave each of them a document entitled "Disability Certificate." For Knorowski, the note stated that she was partially incapacitated from "June 18 to indefinite", with a diagnosis of "acute anxiety neurosis." The note adds that Knorowski was referred to Psychiatrist Dr. Jacoby as soon as possible.

Chizmar's note indicates her period of incapacity to be June 18 to June 25. Under remarks, the note reads "Hypertension Controlled. DX. Anxiety State."

As for McPartlan, her note from Dr. Williams sets forth her period of incapacity from June 23 to June 25, with a diagnosis of "gastroenteritis."

Upon receiving these notes from the employees, Respondent paid them for the sick days that were due them.

Respondent had no past practice, policy or requirement that employees either bring in doctor's notes or see the company doctor when they are out sick.

In this connection, Lucania testified that normally the "Company doctor", is used to examine plant employees when they are hired. He admitted that the company's doctor had not been used in the past to examine clerical employees.

The reason that Respondent allegedly chose to require McPartlan, Knorowski and Chizmar to see Dr. Williams was explained by Lucania. He contends that the action was taken because each of the three employees had left work immediately after incidents involving Monte, and none of them appeared to be sick when they left. Therefore Lucania asserts that Respondent believed that the employees were engaged in a concerted sick out,[18] and wished merely to verify that they were truly sick in order to be eligible for sick pay.

## I. The Discharge of McPartlan

As detailed above, McPartlan's hours (along with those of Knorowski), were changed on June 1 from part time to full time. She was able to adhere to the schedule for the months of June through August, due to a combination of factors such as her own vacation and the fact that her children were attending summer camp.

Meanwhile, after the Board election certifying the union as the collective bargaining representative of the employees, McPartlan was selected as shop steward and a member of the Union's negotiating committee.

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[18] As further support for this belief, Respondent notes that on June 18, the afternoon of the confrontation between Monte and Chizmar and Knorowski, employees Bobb and McNally called in sick and did not return from lunch. These two employees did report for work the next day June 19. These two employees were not required to be examined by Dr. Williams, because according to Lucania, these employees were not paid for the afternoon that they were out.

On August 7, the Region issued its initial complaint in Case No. 22-CA-15105, alleging in part that Respondent has violated Section 8(a)(1) and (3) of the Act by changing the hours of employees on June 1 from part to full time. McPartlan admitted that she was aware of the issuance of such complaint.

In September, when her children resumed school, McPartlan could no longer adhere to an 8:30 a.m. to 5:00 p.m. schedule. Thus she spoke to Monte about her problems. She explained her difficulty in so doing, and pointed out the past history of her being permitted to work part time hours. Monte responded, "well you know, Karen I would really like to help you out but I can't. . . . With all this Union stuff that's going on there's no way I could help you. . . . I've been advised by my lawyers that I can't make any kind of agreement with you outside of the collective bargaining agreement."

McPartlan then decided to send a letter to Respondent, dated September 11, with copies to the Union.

The letter reads, "confirming our arrangement of May 2, 1984 which was later reaffirmed in writing on September 30, 1986, please note on the payroll records that I will once again resume my school year hours of 9:00 a.m. to 3:00 p.m. effective September 14 1987."

Respondent responded in a letter dated September 14. The letter was handed to McPartlan on September 14 by Erica Monte, as well as being sent to her by mail. As Erica Monte handed McPartlan the letter she added, "I'd just like to reiterate that your hours are 8:30 to 5:00 o'clock." McPartlan replied, "those aren't my hours, they were always 9:00 to 3:00." The letter acknowledge receipt

of McPartlan's letter which Respondent characterized as a request to change your working hours." The response was, "your work hours are and continue to remain 8:30 a.m. to 5:00 p.m., Monday through Friday. We expect you to be present during these hours."

On September 15, McPartlan arrived for work at 9:00 a.m. She discussed with Monte Respondent's letter characterizing her letter as a request to change her hours. She asserted to him that she wasn't asking him to change hours, but just to stick to the schedule that had been agreed on. That same day Monte handed McPartlan a letter reiterating Respondent's position that her hours were 8:30 to 5:00 and that Respondent did not "at this time, have a need for part time workers."

McPartlan left work at 3:00 p.m. on September 15. On September 16, she again reported at 9:00 a.m. and left at 3:00 p.m. These actions of McPartlan resulted in two warning letters being sent and or handed to McPartlan, emphasizing that her hours were 8:30 a.m. to 5:00 p.m., and threatening disciplinary action, including discharge, if she continues to report to work late and or leave early.

On September 16, McPartlan responded by letter, again with copies to the Union. McPartlan acknowledges receiving Respondent's letters, and continues, "as you are well aware, my work schedule since May 1984 has been 9:00 a.m. to 3:00 p.m. If you insist on me working from 8:30 a.m. to 5:00 p.m., you will force me to leave. After all our years of good relationship I would ask you to reconsider because I really think what you are doing is an unfair labor practice."

The response to this letter was a discharge letter dated September 17. This letter noted that McPartlan once again on September 17, worked from 9:00 a.m. to 3:00 p.m., in flagrant disregard of company rules." Therefore Respondent characterized this as "willful misconduct, which the company can no longer tolerate." Thus McPartlan was terminated, "effective immediately."

During this period of time, the Union was conducting negotiations with Respondent concerning the plant employees, which as noted the Union also represents. During the course of these negotiations, Ferrante the Union president and its chief negotiator brought up the subject of McPartlan's discharge. Monte responded that he was going to get rid of the whole family. Respondent's lawyer told Monte to be quiet.[19]

On September 28 the last day of the contract, the plant employees voted to strike Respondent. The parties continued negotiating on that day, and the Union made two demands to settle the contract and call off the strike. The demands were a "sympathy strike" clause and McPartlan's reinstatement to her job at her prior part time hours of 9:00 a.m. to 3:00 p.m. Monte agreed to these demands, and the strike was called off.

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[19] I credit the precise and unequivocal testimony of Mclean in this regard, over Monte's vague and uncertain "I don't recall that statement." I additionally rely on the fact that Lucania, another of Respondent's witnesses was present at all the negotiation sessions, and although testifying on matters, gave no testimony as to this rather significant remark by Monte.

McPartlan was notified on September 29 to return to work at her part time schedule on September 30. She resumed work on that date at a schedule of 9:00 a.m. to 3:00 p.m.

### J. The Refusal to Reinstate Knorowski

As discussed *supra*, Knorowski did not return to work after her alleged "assault" and confrontation with Monte on June 18. As also noted, the disability certificate signed by the "Company" doctor, diagnosed her condition as "acute anxiety neurosis" and referred her for psychiatric treatment.

Respondent also received a letter from Knorowski's personal physician, Dr. Ellen Black, dated June 22, stating that Knorowski is under the doctor's care, and to "please excuse her from work until further notice."

Lucania then sent a letter to Knorowski, date June 26, indicating that the above letter was unacceptable, since it did not state the nature of the illness nor any expected date of return. In response to this Dr. Black replied by letter dated July 1. This response gives the diagnosis as "acute anxiety disorder. Progress is guarded." The letter goes on to indicate dates of her visits and concludes "she remains in treatment." No proposed or possible date of return to work was set forth therein.

Subsequently, Knorowski applied for and obtained disability under Respondent's insurance program, as well receiving State disability payments.

In connection with her disability claims filed with Respondent's carrier, Knorowski filled out a form in conjunction with Dr. Jacoby, the psychiatrist, dated September 3. This form describes her sickness or injury as an "adjustment disorder with mixed features." Further, in describing how and where the "injury" occurred, the form reads, "emotional injury June 18, 1987."

Finally the form sets forth an expected return to work for Knorowski as November 1, 1987.

In connection with her disability claims, Dr. Jacoby filled out a questionnaire dated September 23. This questionnaire revealed some of Knorowski's symptoms, "depression, anxiety and tearfulness" and listed as primary cause of disability, "upset over loss of job." Finally Dr. Jacoby concluded by observing "would probably benefit from a return to work."

It was also necessary for Dr. Williams, Respondent's doctor to fill out a form for the carrier, which he did, dated October 5, 1987. This form appears to describe the diagnosis as "emotional disorder", with nature of treatment as "psychotherapy." At another portion of the form, Dr. Williams appears to have written, "severe reaction, overriding fear of returning to work." The bottom of this form also indicates that Knorowski can resume full time employment on November 1, 1987.

On November 2, Knorowski reported to work. Lucania after asking how she was feeling, stated that "we have to sit down and talk." Knorowski then asked Chizmar to be present as the alternate shop steward. They met in Lucania's office. At some point during meeting, Monte was also present. Lucania informed Knorowski that she

was being laid off as of that day, since her position was filled. Knorowski questioned why her position was filled, and noted that she had seniority. Lucania responded that Respondent did not know when or if she was returning to work. Knorowski replied that she had filled out various doctor's forms, and that Respondent knew that she would be returning to work. Lucania repeated, this time supported by Monte that someone had been hired to replace Knorowski, and added that if there are any future clerical openings she would be returned to work.

Chizmar asked, "do you mean to tell me if somebody goes on disability and then comes back to work, they'll be out of a job?" Lucania replied if Respondent has to fill the position, the employee must go on layoff status. Chizmar then brought up the case of Mike Battaglia, an employee in the lab, and pointed out that "twice he came back to work and twice he was given a job." Monte responded to this assertion "Mike called me up, Mike came to see me. He told me he wanted his job back. I didn't even know if Barbara wanted her job back. She wasn't in contact with me." Chizmar replied to this comment that Sal hadn't even given Knorowski a chance, since it hired someone two weeks after she was out. Monte concluded by stating, "I have no choice. I have to lay off Barbara. I have no position open right now."

Subsequently Knorowski received a letter dated November 2, from Lucania. The letter confirms the discussion held that day, "wherein you were advised that your former position had been filled while you were out on indefinite leave due to personal illness commencing on June 18, 1987."

The letter goes on to state that due to the unavailability of any openings, she was being placed on "indefinite lay off" and would be recalled to the next available opening in the office clerical unit.

Monte and Lucania both testified to Respondent's position on the matter, which essentially confirms its letter, and its conversation with Knorowski on November 1. Respondent needed to fill Knorowski's position, and it did not know whether Knorowski ever intended to return to work.

Both Monte and Lucania testified that Respondent replaced Knorowski by hiring employee Barbara Mateland as a sales order clerk on July 27. Respondent had put an advertisement in the paper on July 4. It also hired Maria Lucania as a sales order clerk on July 13.[20] Respondent also hired 4-5 other clerical employees in June, July and August in various other clerical positions including accounts payable, inventory clerk, secretary, and the last hire, Monte's confidential secretary on August 18.

According to Monte, between the time that Knorowski left and Mateland was hired, his daughters were sitting in Knorowski's chair and filling in and performing her work. When Mateland was hired, his daughter Debbie trained her to become familiar with Respondent's operations.

Monte and Lucania discussed Knorowski's situation and concluded that they had not heard from her and

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[20] The record contains no testimony as to why Lucania was not considered Knorowski's replacement.

didn't know if she was ever coming back to work. Admittedly neither Monte nor Lucania attempted to contact Knorowski to see if she intended to return to work. When asked why he did not, Monte replied, "I didn't want to go near that."

Monte further testified,

> I quite frankly didn't think she wanted to be in the same office with me anymore because of this incident, that is what I think was the situation, so I didn't think she was ever coming back.. . . . I though she didn't want to come back and never see me again. I figured what the hell, the desk is sitting there. . . . so I had to get somebody to replace her.

Respondent's first notification that Knorowski intended to return came on insurance papers filed by her in early September, in which the November 1 date was mentioned. Monte and Lucania discussed with its attorney what position to take when and if she actually returns. They concluded that they would not offer her a position and would merely place her on a preferential hiring list.

Lucania testified concerning Respondent's past treatment of plant and office employees who were out on various kinds of disability and sought to return to work. Generally according to Lucania, when an employee returns to work from disability, Respondent "in most cases", takes the people back when they finally recover. As Lucania testified, "the nature of our operations, we can be flexible and re-schedule and move people around."

As for specific cases, Lucania recalled the case of Judy Kobryn, who was out of work for six to eight weeks with a broken leg. During this period of time, work was brought to her home to type, her job was not filled, and she was permitted to return to work.

Additionally he recalled the case of Maryellen Wierzbicki, an accountant, who was out for 4-6 weeks. In her absence, a supervisor performed her functions, her job was not filled, and she was allowed to return to work.

Lucania also testified about employee Mike Battaglia, whose case as noted, was mentioned by Chizmar on November 2. Battaglia, a lab technician was first out on disability in the Spring of 1985 for one year, and he was permitted to return. His job was not filled for the entire year, because Respondent was able to perform his job with the remaining staff. Battaglia was out with a back injury on disability from February 1987 to July of 1987. His position as a lab technician was filled during the period of his second disability.

Respondent received a letter from the Insurance Company, dated July 24 1987, indicating that Battaglia can return to work, but at a "a lighter duty than Mr. Battaglia was used to before." Respondent at that point in effect created a new job for Battaglia, as Lucania described it, as a general office gofer and chauffeur for Mr. Spiegelhalder. In fact a memo was distributed, outlining Battaglia's new duties.[21]

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[21] Lucania admitted that there was no discussion between he and Monte about Respondent attempting to find work for Knorowski to perform as it had done with Battaglia.

Lucania also testified about Respondent's treatment of plant employee Cesar Gonzalez. He injured himself falling off a roof, and was initially out of work on compensation for a year. His position was filled after two months, once the position had been posted. Gonzalez attempted to come back to work, and Respondent agreed to take him back if he was physically able to perform. Respondent was going to employ him in a different position, but he could not physically handle the job, and went back on compensation. Subsequently, the Insurance Company Doctors recommended that Gonzalez undergo a myelogram. He refused this treatment. Therefore his compensation was eliminated and Respondent sent a letter terminating Gonzalez's employment.

The Gonzalez incident is the only time that Lucania can recall where Respondent ever terminated or refused to allow an employee to return to work after being out on disability. No other evidence was presented by Respondent, that it had ever refused to permit an employee to return to work who was attempting to return to work after recovering from disability.

## IV. Analysis

### A. The Alleged 8(a)(1) Statements

The complaint alleges and General Counsel contends that Respondent violated Section 8(a)(1) of the Act by promising during Monte's June 3 speech to employees that it would grant a 7% raise once sales hit 1.2 million dollars. General Counsel argues that these comments were "undertaken with the express purpose of impinging upon their freedom of choice for or against unionization

and is reasonably calculated to have that effect." *NLRB v. Exchange Parts Co.*, 55 LRRM 2098, 2100 (1964) I do not agree.

I have found above, consistent with the testimony of General Counsel's own witness Helen Chizmar, as well as Respondent's witnesses, that Respondent had formulated a plan to grant a 7% wage increase when sales reached 1.2 million dollars per month, well before the advent of unionization. Moreover, and most significantly this plan was announced to Respondent's supervisors and employees, and had been as Helen Chizmar herself admitted a "matter of common knowledge" in the shop. In these circumstances, Monte's reference to this possible increase although raised in the content of an antiunion speech, was merely a reaffirmation of and a reminder to its employees of its previously announced plans to grant the increase when sales reached a certain level. Therefore, these remarks are not violative of the Act. *Cartridge Actuated Devices, Inc.*, 282 NLRB No. 66 slip op. at p.6 and 7 (1986); *Clark Equipment Co.*, 278 NLRB 498, 500 (1986).

General Counsel also alleges that Monte's plea to employees that they "can always vote the union in later," if they later learned that what he was telling them was not true, is also violative of the Act. *S.L. Industries Inc.*, 252 NLRB 1058, 1076 (1980); *St. Francis Federation of Nurses v. NLRB*, 115 LRRM 3352, 3359 (D.C. Cir. 1984).

Once again I do not agree with General Counsel's position. I find Monte's remarks in this regard to be too vague to rise to the level of illegal promises of benefit.

These kinds of statements are within the limits of permissible 8(c) statements. *National Micronetics Inc.*, 277 NLRB 993, (1985); *Clark Equipment, supra;* at 500.

Indeed, these statements herein cannot reasonably be construed as a promise to show "responsiveness to employees' dissatisfaction which led them to seek representation." Cf. *S.L. Industries, supra* at 1096. It is clear from the context of Monte's statements that his reference to "if what I'm telling you isn't true", deals with his previous discussion of the 7% wage increase. Thus since I have already concluded that Monte's promise to grant the increase when and if sales reach 1.2 million was not unlawful, then it follows that his plea to in effect "vote the union in later", if he fails to deliver on his promise, is similarly not violative of the Act.

I shall therefore recommend dismissal of these allegations of the complaint.

On or about June 10, Monte, in his attempt to persuade Cathy Chizmar, who was in his mind the crucial vote in the union election, to abandon the Union, discussed with her his views of unionization. After making his remarks relative to his view of bargaining,[22] Monte asked, "how would you like to punch a time clock"? This rhetorical question constitutes a threat that time clocks would be instituted if the Union becomes the employees representative, and is violative of Section 8(a)(1) of the Act. *American Sunroof Corp.*, 248 NLRB 748, 766 (1980). I so find.

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[22] The legality of these remarks will be further discussed below.

Prior to making this comment, Monte as I have found above said the following to Chizmar:

> If you vote in a union you have to start from scratch. No benefits, no salaries, no vacation. . . . Both sides have proposals and if you don't like our proposals you have the right to go on strike.

Both sides quote approvingly from different portions of *Plastronics, Inc.*, 233 NLRB 155, 156 (1977), which accurately depicts the analysis which must be made in ascertaining whether bargaining from scratch statements, such as that made by Monte is violative of the Act. Such statements are unlawful,

> When, in context they effectively threaten employees with the loss of existing benefits and leave them with the impression that what they may ultimately receive depends in large measure upon what the Union can induce the employer to restore. On the other hand such statements are not objectionable when additional communication to the employees dispels any implication that wages and or benefits will be reduced during the course of bargaining and establishes that any reduction in wages will occur only as a result of the normal give and take of collective bargaining. The totality of all the circumstances must be viewed to determine the effect of the statements on the employees. *Id.* at 156. (footnotes omitted)

In this instance I agree with General Counsel, that Monte's statements herein fall within the former portions of the above cited quote, and are violative of the Act. After mentioning the necessity of starting from scratch when a union comes in, Monte emphasized, "no benefits, no salaries, no vacations." The clear inference remarks is that bargaining would start only after all of these benefits

were eliminated, *Mississippi Chemical Co.*, 280 NLRB No. 461 ALJD slip op. 8 (1988) and that the Union would have to persuade Respondent to restore even the present benefits if it could. *TRW United Greenfield Division*, 245 NLRB 1135, 1142 (1979). See also *Beverly Enterprises Indiana Inc.*, 281 NLRB No. 8 ALJD slip op. p. 9 (1986).

Respondent urges that Monte's comments are no more than a permissible description of the realities of collective bargaining. Indeed it is lawful to inform employees of the "realities of collective bargaining, which includes the possibility that the Union, in order to secure some other benefits, might trade away some existing benefits." *Tufts Brothers, Inc.*, 235 NLRB 808 (1978).

In my view Monte's subsequent remarks that "both sides have proposals, and if you don't like our proposals, you have the right to go on strike" do not suggest the possibility that benefits might be lost by the Union trading away benefits.[23] These are "not assurances that such losses, if any, would be the result of the normal give and take of collective bargaining and not of employer retaliation." *Taylor Dunn Mfg. Co.*, 252 NLRB 799, 780 (180).

The clear import of these statements appears to be that Respondent will adopt a regressive bargaining posture, i.e. begin negotiations by withdrawing the benefits that he described, and that the union would be forced to strike to force it to restore these benefits to the employees. *Textron Inc.*, 199 NLRB 131, 133-135 (1972); *Aerovox Corp.*, 172 NLRB 1011, 1012 (1968).

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[23] Cf. *Histacount Corp.*, 278 NLRB 681,689 (1986); *Fiber Glass Systems*, 278 NLRB 1255, 1259 (1986).

I note significantly, that Monte's remarks were not in a context free of other unfair labor practices.[24] It is well settled that the presence of contemporaneous threats or unfair labor practices is often a critical factor in determining whether there is a threatening color to the employer's remarks. *Coach & Equipment Sales Corp.*, 228 NLRB 440, 441 (1977); *Taylor Dunn, supra; Belcher Towing Co.*, 265 NLRB 1258, 1268 (1982). Here Monte as found above, during the same conversation with Chizmar unlawfully threatened to institute a time clock for employees in the event they selected the Union. Moreover, a little over a week before this conversation, Respondent changed the hours of Chizmar and employee McPartlan from part time to full time. As will be detailed below, this action was unlawfully motivated. Therefore this evidence of a discriminatory change of hours, plus the contemporaneous unlawful threat, both involving Chizmar, the same employee to whom Monte addressed his bargaining from scratch comments, is highly indicative that these comments should be construed as an implied threat. *Beverly Enterprises, supra; TRW United, supra; Taylor Dunn, supra.*

Accordingly, based on the above analysis and authorities, I concluded that Monte's remarks to Chizmar on June 10 are violative of Section 8(a)(1) of the Act.

On June 18, as detailed above, Monte had a confrontation with Knorowski, characterized by General Counsel

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[24] Cf. *Kawasaki Motors Mfg.*, 280 NLRB No. 53 slip op. p. 7 (1986); *Histacount Corp., supra.*

as an "assault",[25] which resulted in various statements made by Monte to both Knorowski and Cathy Chizmar.

During the course of these events, Bob McLean the Union shop steward for the plant employees was called in to the area by the employees. After McLean asked what had happened, Monte replied, "you know what happened, it's got to do with this fucking union." McLean then requested that Monte take it easy and went out to call the Union presidents.

At that moment, Monte addressed the employees and said, "you don't know what your getting yourself into by bringing in a fuckin union." I find in agreement with General Counsel that this remark by Monte constitutes an unlawful threat of reprisals, which reasonably tends to discourage employees from engaging in protected concerted activities. *John J. Hudson Inc.*, 275 NLRB 874, 879 (1985); *AVA Foods Inc. d/b/a/ Carrick Foodland*, 238 NLRB 568, 571 (1978).

I note that this remark was made immediately after the employees called upon McLean the steward to assist them after Monte had "assaulted" Knorowski, and verbally abused Chizmar and Knorowski, primarily because of the employees' union activity.[26]

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[25] The lawfulness of this alleged assault will be discussed *infra*.

[26] As will be discussed more fully below, Monte admitted that the reason for his rejection of Knorowski's expression of condolences, was based on her engaging in union activities while he was grieving for his father. This rejection by Monte precipitated the entire incident on june 18.

In this circumstances Monte's remarks, cannot reasonably be construed, as contended by Respondent, as merely "an expression of Monte's belief that employees were making a mistake by organizing with union", but is a statement that impliedly threatens reprisals in violation of the Act.

Prior to McLean entering the scene, I have found that Monte approached Knorowski, still sobbing from his prior "assault" and abusive language directed towards her. After Monte continued his abuse by stating, "what the hell's wrong with you." Chizmar interceded on Knorowski's behalf. Monte told Chizmar "it's none of your fucking business", and concluded his discussion with her by saying "If you don't like the way I run my fucking business, get the fuck out, I don't need you."

After pushing a three tier bin off of Chizmar's desk, Monte turned to Knorowski who was still hysterical, and commented, "why don't you cry somewhere else you fucking cunt."

It is well settled that invitations to quit to employees motivated by their union or other protected activities are coercive and threatening, because it conveys to employees the clear message that support for the Union and continued employment are not compatible. *L.A. Baker Electric Co.* 265 NLRB 1579, 1580 (1983) and cases cited therein; *Maywood Inc.*, 251 NLRB 979, 983 (1980). See also *Bill Scott Oldsmobile*, 282 NLRB No. 140 ALJD slip op. p. 8 (1987).

I find that both of these statements by Monte fall within the proscriptions of the above cases, and are violative of the Act. While Monte did not mention the Union

in either of these remarks, it is clear that he was aware that Knorowski and Chizmar were two union adherents, and in fact Monte had been unsuccessful in persuading Chizmar who he thought might have been a weak link, to abandon her support for the Union. Moreover, as I have outlined, the incident which preceded these comments, i.e. the "assault" was precipitated by Monte's annoyance at Knorowski's union activities while he was grieving his father. Finally, with respect to the statement made to Chizmar, she was complaining about Monte's treatment of Knorowski, which constitutes protected concerted activity in and of itself, regardless of any union activities. Thus the invitation to Chizmar that she quit because of these complaints, is independently violative, because it will reasonably be construed as a threat that further complaints will result in discharge. *Bill Scott, supra.* Therefore I conclude that Respondent was violated Section 8(a)(1) of the Act by Monte's statements to Knorowski and Chizmar.[27]

### B. The Discharge of Helen Chizmar

It is well established that a discharge of a supervisory employee because of the Union activities of employees who were members of the supervisors' family, is violative

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[27] I find *Zartic Inc.*, 277 NLRB 1478, 1497 (1986), cited by Respondent with respect to these statements to be inapposite. The remarks in *Zartic Inc., supra,* merely indicated that no one was going to tell the Employer how to run his plant, and contained no suggestion either express or implied that employees should quit or go somewhere else as in the instant case.

of Section 8(a)(1) of the Act.[28] Such a discharge, resulting not from any participation in union or concerted activities by the supervisor, but from the exercise of Section 7 rights of the employees, has the direct, severe and unmistakable thrust of interfering with those employee relatives in the exercise of their rights. *Advertiser's Manufacturing, supra,* slip op. at p. 4.

In evaluating whether Respondent's termination of Helen Chizmar is governed by the above precedent, it is necessary as it is in all cases dealing with motivation issues, to first consider whether General Counsel has established that protected conduct was a motivating factor in Respondent's decision. *Wright Line a Division of Wright Line Inc.,* 251 NLRB 1083, 1089 (1980).

In my view, General Counsel has established a strong and compelling prima facie case that protected conduct, i.e., the union activity of Chizmar's relatives, was a motivating factor in Respondent's decision to discharge her. All three of Helen Chizmar's relatives, McPartlan (her daughter), Knorowski (her sister), and Cathy Chizmar (her daughter in law) signed cards for the Union. When Monte received the Union's demand for recognition, it stated that the employees had unanimously signed cards, thereby establishing Respondent's knowledge that these three had been card signers. More significantly,

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[28] *Advertiser's Manufacturing Co.,* 280 NLRB No. 128 slip op. p. 2-4 (1986); enf. 823 F.2d 1086 (7th Cir. 1987); *Dewey Brothers Inc.,* 187 NLRB 137, 142 (1970), enf. 457 F.2d 511 (5th Cir. 1972); *Consolidated Foods Corp.,* 165 NLRB 953, 959 (1967); *Golub Bros.,* 140 NLRB 120, 121, (1962), *Brookside Industries Inc.,* 135 NLRB 16, 17 (1962).

Monte admitted that when he received such demand, he "looked at the players", to assess his chances of persuading a majority of the employees to abandon their union support. After eliminating Kobryn who was leaving, and Ferrano who he intended to designate as confidential secretary, five employees remained in the unit. Monte concluded that McPartlan and Knorowski as close relatives of the Union's first shop steward were not likely to change their minds about the Union.[29] As Monte himself admitted, "the family is not going to back off . . . from the Union. It's in the family culture."[30] However, Monte believed that he would be able to dissuade employees Bobb and McNally, but was not sure about Catherine Chizmar. Although she was also a member of the family, it was only through marriage, and she had previously expressed some disenchantment with her mother in law.

Thus the requisite knowledge of the Union activities of Chizmar's relatives is firmly established.

The evidence also discloses ample evidence of Respondent's animus towards its clerical employees efforts to unionize. Thus when Monte first received the Union's demand, he admitted that he felt "shocked" and

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[29] As noted, the father of Helen Chizmar and Knorowski, and the grandfather of McPartlan was the Union's first shop steward.

[30] Indeed when Monte eventually held his meeting to try to convince employees not to vote for the Union, he was so sure of Knorowski's and McPartlan's sentiments, that he failed to invite these employees to the meeting.

"betrayed" by such developments. Immediately a managers meeting was called, and Lucania notified the managers that the clerical employees had all signed up for the Union. Lucania added that Respondent would be "arguing that the Union. Lucania added that Respondent would be "arguing that the girls were coerced into this union, but "that would only buy time because it was a unanimous decision by the girls." Lucania then turned to Helen Chizmar, and said, "here read the letter, but you probably know all about it." This remark tends to show that Respondent was attempting to blame Chizmar for the fact that her relatives had chosen to bring in a union.

Additionally, the record reveals that during negotiations with the Union, Monte made the remark to the Union negotiators, that he was going to "get rid of the whole family", referring to the Chizmar family. Such a statement is highly indicative of Respondent's intent to discharge Helen Chizmar because of the union activities of members of her family. See *Golub Bros., supra* at 121.

Moreover, Bernicker as Respondent's agent, attributed to Monte, the comment that he had terminated Helen Chizmar in part because, Monte "was not going to put up with any union bullshit."

Finally, I have found below that Respondent committed a number of unlawful 8(a)(1) threats of reprisal, which also adds to the record evidence of Respondent's vehement animus towards its clerical employees efforts to select the Union as their collective bargaining representative.

The timing of Respondent's actions in terminating Helen Chizmar is even more persuasive evidence of the

unlawful nature of its decision. Thus Monte admitted that once he received notice of the Union's demand, Helen was "pretty much gone." The following week, on the same day that it received the Union's petition from the Board, Chizmar was terminated.

Having found that a strong prima facie case of discriminatory motivation has been established, the burden then shifts to Respondent to prove by a preponderance of the evidence that it would have taken the same action absent the protected conduct. *NLRB v. Transportation Management*, 462 US 393 (1983), *Wright Line, supra.*

Respondent attempts to meet this burden by asserting that the real reason that it terminated Chizmar, was that the unionization of the clerical staff created an inherent conflict of interest for her, and that Monte thereby lost confidence in Chizmar's ability to provide her undivided loyalty to Respondent. Respondent points to the fact that three out of five members of the bargaining unit were close relatives of Chizmar, and that Respondent had previously received complaints from other employees about Chizmar's allegedly according favorable treatment to her relatives.

Monte testified on behalf of Respondent, that he alone made the decision to terminate Chizmar. He asserted that he felt the unionization of the employees in a unit including her relatives, created in his mind an inherent conflict of interest. As Monte phased it, "you can't have a fox watching the chickens." Monte added that he felt that Chizmar could not "sit across the bargaining table" from her relatives and properly represent

management, and he would not feel comfortable discussing bargaining strategies with Chizmar, where he felt that she would then discuss them with her relatives. Finally, Monte also points to the alleged "divisiveness" created by Chizmar's past history of allegedly giving preference to her relatives in job assignments and other personnel matters.

Without passing upon whether Respondent's assertions that the unionization of a unit including three of her relatives, created a sufficient conflict of interest to warrant Respondent's decision to terminate Chizmar[31], I conclude that Respondent has not established by a preponderance of the evidence that in fact this was the reason for its actions.

Initially I note that at no time did Monte ever tell Chizmar or anyone else, including Unemployment, that he terminated her because of a perceived "conflict of interest" or a loss of confidence in her "undivided loyalty." Rather the evidence discloses that he gave a totally different reason to Helen Chizmar at the time of discharge, i.e. that Respondent couldn't "afford her" and it

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[31] I note in this connection that Respondent's actions even accepting its theory, was not based on any participation by Chizmar in any union or concerted activities. See *Advertiser's Manufacturing Co., supra.* Indeed Respondent's decision, accepting Monte's testimony, was not based primarily on any actions of Chizmar, but solely premised on his alleged perception of what potential problems might arise from her relatives union activities. However, as noted above, I need not and do not pass upon the validity of such a defense, since I conclude that Respondent has not established that its decision to terminate Chizmar was based upon these reasons.

could get someone else for less. Additionally, I have found that he told Jill Bernicker (its agent) that he fired Chizmar because, "I couldn't keep her for financial reasons, and I was not going to put up with any union bullshit." Once again Monte did not tell Bernicker, one of its own agents, that he discharged Chizmar because of any conflict of interest.

Finally Monte gave an entirely different reason when discussing the matter with Cathy Chizmar, sometime in June. In the first conversation he told Cathy Chizmar that he had fired Helen, "because she couldn't do the technical end of the job." Later on that same day, Monte again spoke to Cathy Chizmar about her mother in law's discharge. On this occasion, he told Cathy that he fired Helen Chizmar because, "I couldn't afford her and because no matter what I did for her she was never happy." Once more no mention was made by Monte in either of these conversations that any "conflict of interest" motivated the discharge of Helen Chizmar.

Thus in these circumstances, the inconsistent and shifting reasons given by Monte to various people including Chizmar herself, none of which conform to the asserted reason given at trial, demonstrates an inability on the part of Respondent to adhere with consistency to any explanation for its action. Thus an unfavorable inference is warranted against Respondent. *PIE National Inc.*, 282 NLRB No. 152 ALJD slip op. p. 10 (1987); *Superior Warehouse Grocers*, 277 NLRB 18, 21 (1985); *American Model & Pattern Ind.*, 277 NLRB 176, 182 (1985); *Zwin Industries Inc.*, 255 NLRB 632, 634-5 (1981).

Respondent's contention and Monte's testimony that the alleged "divisiveness" created by Chizmar's prior favorable treatment of her relatives, motivated in part Respondent's decision to discharge her, and or demonstrated that perceived conflict of interest is unsupported by the record. Respondent tolerated these complaints from other employees about Chizmar's alleged favoritism to her relatives for some time, without ever confronting Chizmar with these complaints, much less discipline her because as Monte admitted "these were just staff people bitching" and "the job was getting done."

Moreover, Monte's assertions that he feared possible conflicts because of his inability to use Chizmar as a member of its negotiating team is also not persuasive. Respondent could easily have chosen not to make Chizmar a member of its bargaining team and not discuss bargaining strategy with her. In fact when Respondent did bargain with the Union, Monte, Lucania and his wife comprised the entire management bargaining team.

Most significantly however, when Respondent discharged Chizmar on May 29, the petition had just been filed, and the Union had not as yet been certified or recognized by Respondent as the representative of its employees. Indeed Monte admitted that at that point in time he had hopes of persuading Cathy Chizmar and two other employees to abandon their support for the Union, and defeat the Union's chances of representing the employees. However Respondent still found it necessary to discharge Chizmar, even though all these perceived conflicts of interest i.e. problems with bargaining teams, strategy and grievances had not and might not ever come

to pass, should the Union not have been successful in obtaining representation rights.

The above is demonstrative in my view, of Monte's real concerns with Chizmar which is further highlighted by Monte's own testimony concerning his decision to terminate her. Thus Monte admitted that as soon as he received the Union's demand, Chizmar "was pretty much gone", because "I cannot conceive of me receiving that notification and having that clerical unit form without Helen knowing about it. Just impossible." This testimony is also consistent with Lucania's handing Chizmar the demand letter, and stating "you probably know all about it already." Thus I conclude that Respondent believed that Chizmar must have been fully aware of the efforts of its relative employees to organize, and that she should have notified Respondent of this information,[32] and most importantly prevented these employees from continuing in their efforts to unionize the clerical staff. It is well established that a discharge of a supervisor for failure to prevent unionization is violative of the Act. *Advertiser's Manufacturing, supra; Talladega Cotton Factory Inc.*, 106 NLRB 295, 296 enfd. 213 F.2d 209, 215-217 (5th Cir. 1954); *Huskey Mfg. Co.*, 196 NLRB 683, 690 (1972), *Parker Robb Chevrolet Inc.*, 262 NLRB 402, 403 (1982).

In my opinion, the concept of loyalty and lack of confidence that Monte testified about with regard to Chizmar was not in Monte's view related to any future problems that might arise with respect to her carrying out

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[32] See *Brookside Industries Inc.*, 135 NLRB 16, 17 25 (1962); and *Inter City Advertising Co.*, 89 NLRB 1103, 1106, 1107 (1950).

her management responsibilities, but to her failure to demonstrate her loyalty by nipping in the bud the efforts of her relatives to unionize.

Indeed, Respondent's arguments vis-a-vis a conflict of interest has some obvious surface appeal. Most employers would probably view a situation where a supervisor directly supervised three of her close relatives in a small unit as a conflict of interest, and would not tolerate such an arrangement. However the facts here demonstrate that Respondent has permitted such a situation to exist for a number of years, notwithstanding the fact that it received complaints from employees about favorable treatment accorded by Chizmar to her relatives. It is not surprising therefore that Monte felt "shocked" and "betrayed" that his clerical employees, spearheaded by the "Chizmar" family would pay him back for his largesse by attempting to unionize. I believe that Monte felt that since he had tolerated an arrangement beneficial to the Chizmar family, that most employers would not, entitled him to expect loyalty from both the relative employees (not to unionize), and from the supervisor (to prevent such unionization of her relatives) that he did not receive. I conclude that the failure of the relative employees and of Helen Chizmar to meet Monte's definition of loyalty as described above, was the true motivating factor in Monte's decision to terminate Chizmar. Accordingly, I find that Respondent has failed to meet its burden of establishing that it would have terminated Chizmar for lawful, non discriminatory reasons, notwithstanding the protected conduct of her relative employees.

Therefore her termination is violative of Section 8(a)(1) of the Act.[33] I so find.

### C. The Change of Work Hours of Knorowski and McPartlan

On the following work day after the discharge of Helen Chizmar, Respondent notified McPartlan and Knorowski that their work hours would be changed to 8:30 a.m. to 5:30 p.m., from their previous part time status. The timing alone of this action raises considerable suspicion. Coupling the timing with the aforementioned evidence of Respondent's belief that Knorowski and McPartlan were the two chief union adherents who could not be dissuaded from changing their minds due to their "family culture", and the intense animus[34] displayed by Monte towards the efforts of his clericals to unionize, once again establishes a strong prima facie case that Respondent's decision to change the hours of McPartlan and Knorowski was motivated by their protected conduct.

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[33] *Advertiser's Manufacturing., supra; Consolidated Foods, supra; Golub Bros., supra; Talladega Cotton, supra; Huskey Mfg., supra.*

[34] As noted above, such evidence, includes Monte's admission that he felt "betrayed", and "shocked" that the clerical employees chose to unionize, his remarks that during the negotiations that he intends to "get rid of the whole family", and the 8(a)(1) statements that Monte made to various employees.

Once again Respondent has fallen far short of meeting its burden of establishing that it would have made such a change, absent their union activity.

Respondent argues, consistent with the testimony of Monte, that it took this action in line with Respondent's previously expressed desire not to have any part time employees. Monte explained that the action was taken on June 1, because he just terminated Chizmar, and that the decision was taken at that time because their part status had been viewed "by everybody" as another example of favoritism for Chizmar's relatives. Monte further testified that since he had terminated Chizmar, there no was longer any "obstacle" to his carrying out his desire to eliminate part time employment.

I find Respondent's defense to be totally unpersuasive. Initially it must be noted that I have found Helen Chizmar's termination to have been unlawfully motivated. Thus it is doubtful whether Respondent can use the unlawful discharge of Chizmar, because of her relatives union activities, to justify or excuse its subsequent decision to change the hours of these same relatives, or to establish that it would have taken the same action, absent their union activities. Clearly, had Knorowski and McPartlan not selected the Union as their representative, their part time status would have been retained.

Moreover, Respondent's argument that Chizmar's discharge removed the "obstacle" to Respondent changing the hours of the employees is unsupported by the record or by logic. The fact is that Monte and Lucania were clearly Chizmar's superiors, and there is no evidence in the record explaining why they simply could not

have instructed Chizmar to eliminate the employees part-time status or simply have effectuated the change themselves. In this connection, Respondent's citation of its actions in September 1986 of eliminating McPartlan's flexitime as proof of its non discrimination in 1987, is more persuasive proof of the contrary conclusion. Thus, although it is true that the 1986 change was made prior to the Union's appearance, more significantly this change was apparently made by management when Chizmar was still the office manager, and still supervising the employees. Thus it is clear that Respondent's claim that it didn't make the change to full time status for these employees earlier, simply because Chizmar was still the office manger is pretextual and unsubstantiated.

Most significant of all, is the simple fact that Respondent had a long history of accommodating the personal desires of both McPartlan and Knorowski for a number of years, with respect to their working hours. *Santa Rosa Blueprint Service Inc.*, 288 NLRB No. 88 ALJD slip op. p. 54 (1988); *Michaels Inc. d/b/a Saint Jean Des Pres Restaurant*, 279 NLRB 109, 116 (1986).

While it is undisputed that Respondent had expressed a desire for sometime to eliminate part time employees, and had made such desire known to employees, it also undisputed that no such change was made prior to the Union's appearance. Indeed while Respondent's officials had asked the employees to work full time and indicated its desire for such a change, it had always acquiesced when the employees refused to agree.

No business reason was even suggested to explain Respondent's sudden departure from its previous position of accommodating the preferences of these employees, other than the fact that Helen Chizmar was now gone, which I have found to be pretextual. Therefore, the only logical conclusion to be drawn, that it was McPartlan and Knorowski's union activities that accounted for Respondent's decision to cease accommodating their preferences for part time hours.

Accordingly, Respondent has not met its burden of establishing that it would have changed the hours of McPartlan and Knorowski absent their union activities, and I therefore find that it has violated Section 8(a)(1) and (3) of the Act by such conduct. *Santa Rosa, supra; Saint Jean, supra; St. Paul's Church Home Inc.*, 275 NLRB 1242, 1253 (1985), *Anchorage Times Publishing Co.*, 237 NLRB 544, 557, 558 (1978).

### D. The Alleged Assault of Knorowski

If an employer assaults or otherwise physically abuses its employees because of said employees protected activities, such conduct is violative of Section 8(a)(1) of the Act. *Graves Trucking Inc.*, 246 NLRB 344 (1979) enfd in pertinent part 692 F.2d 470 (7th Cir. 1982); *Studio S.J.T. Limited*, 277 NLRB 1189, 1194 (1985); *Rike's a Division of Federated Stores*, 241 NLRB 240, 252 (1979); *Greyhound Taxi Co.*, 234 NLRB 865, 875 (1978); *Hot Bagels and Donuts*, 227 NLRB 1597, 1608 (1977); *Schultz, Snyder & Steele Limber*, 198 NLRB 431, 434, 435 (1972).

General Counsel contends that on June 18, Monte pushed and assaulted Knorowski because of her union

activities, and has thereby violated the Act. Respondent argues on the other hand that the confrontation between Monte and Knorowski, was a purely personal encounter not related to any Section 7 conduct. Moreover, Respondent contends that whatever physical contact may have occurred was purely accidental, and was in fact instigated by Knorowski's grasping Monte's hand, followed by Monte merely responding to the unsolicited and unwarranted attentions of "Ms. Knorowski."

Respondent points to the fact that Monte made no reference to the Union until after the alleged assault of Knorowski had occurred, and views the incident as merely a personal matter of Monte rejecting Knorowski's condolences. I do not agree.

I find it highly relevant as to why Monte rejected Knorowski's attempt to offer her condolences, since that rejection by Monte precipitated the entire incident. In this regard, Monte freely admits that he rejected the condolences of Knorowski because she engaged in union activities. Thus Monte admitted that while he was away "grieving" for his father, he received reports that Knorowski was engaging in union activities by attempting to persuade Ferrano to support the Union. Monte further admits such conduct by Knorowski "really frosted me." Moreover, Monte also admitted that he rejected Knorowski's condolences because he felt that her sympathy was not expressed sincerely in view of her actions in engaging in union activities while he was mourning his father. As Monte testified, "the so called application of sympathy flew in the face of her behavior pattern while I was bereaving my dad."

I also do not agree that Monte's conduct can be described as accidental. I agree with General Counsel's position that in these circumstances Monte had the burden of avoiding physical contract with Knorowski. The incident occurred in a narrow hallway, and two people could not pass by each other without one of them getting out of the way. It was certainly not reasonable for Knorowski to believe that Monte would reject her condolences, push her hand aside and, then continue walking at full momentum. The only reasonably foreseeable result of Monte's actions is that Knorowski would be propelled into the filing cabinets. I therefore conclude that Monte's actions do constitute and assault upon Knorowski, because of her union activities, and is violative of Section 8(a)(1) of the Act. *Graves Trucking, supra* and other cases cited above.[35]

### E. The Removal of McPartlan's Telephone

It is well established that an Employer violates Section 8(a)(1) and (3) of the Act when it revokes telephone

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[35] Respondent also seeks to justify Monte's conduct on the grounds that he was still upset over the loss of his father. I find this to be no excuse. On the contrary, I view Monte's reaction at that time to be further evidence of the intensity of his animus towards the Union's organizational efforts. Thus at a time when he was grieving for his father, one would expect that such mundane matters as the unionization of a small group of his employees, would not be upermost in his mind. Yet Monte was so incensed about the "betrayal" as he characterized it of the "Chizmar" family in unionizing, that he permitted such anger to induce him to react in an almost unheard of manner, i.e. – rejecting Knorowski's condolences coupled with the use of vulgar language and an assault.

privileges previously granted to employees, because of their union activities. *Advertiser's Mfg., supra,* ALDJ slip op. p. 6-8; *Port Plasters Inc.,* 279 NLRB 362, 379 (1986); *Elizabeth Motors Inc.,* 252 NLRB 1148, 1153 (1980); *Stoughton Trailers Inc.,* 234 NLRB 1203, 1206, 1207 (1978).

Once more a strong and compelling prima facie case has been established that this action was motivated by McPartlan's union activities. It was admitted by Monte that he considered her to be one of the two leading union activists who could not be dissuaded from her adherence to the Union. Respondent's animus is amply demonstrated as noted above, by the various 8(a)(1) statements, Monte's remark that he wished to "get rid of the whole family", and his admission that he felt "betrayed" by the clericals organizational efforts. The timing of this action coming within weeks of the petition being filed, and shortly after the unlawful assault upon Knorowski, the other leading union adherent, further supports the discriminatory nature of Respondent's actions.

Once more, Respondent has fallen far short of meeting its burden that it would have removed McPartlan's phone, absent her union activities. Respondent asserts that Monte was motivated solely by his reasonable belief that McPartlan was making excessive use of the phone for personal calls. I find this explanation to be purely pretextual and unsupported by the record. Indeed an examination of Monte's testimony in this area, the only evidence offered in support of Respondent's position,[36] reveals

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[36] I note that neither Monte's daughters nor his wife, who allegedly observed and reported to Monte, McPartlan's "excessive" personal use of the phone, were called as witnesses to support Monte's testimony.

clearly the pretextual nature of its defense. Thus Monte testified that "for a period of days immediately preceding" his action, McPartlan was making excessive use of the phone not on company business. However McPartlan was on vacation for the entire week prior to Respondent's action. McPartlan returned to work on June 22, and the phone was removed at the end of that day. Therefore any elleged abuse according to Monte's own testimony could only have taken place on that day June 22. Yet Monte's testimony also alleges that he was informed about McPartlan's transgressions at the dinner table by his family, which could not have occurred on that day since the action was taken by Monte prior to his going home on June 22.

Moreover, and perhaps just as significant, Respondent has never had a rule of policy prohibiting the use of telephones for personal business. McPartlan was never warned or even spoken to by Respondent's officials about the use of the phone for personal calls. When Monte removed her phone again on June 23, he did not even at that time inform her that she shouldn't be making personal calls, but merely said, "I don't want you to have a phone."

Furthermore, when asked who he suspected McPartlan was talking to on these alleged personal calls, Monte answered, her mother, the Union, Knorowski or Chizmar. This response is also quite revealing as to Monte's motivation. I note that he did not mention that he thought that McPartlan was speaking to her daughters or husband or other people at her home, with whom one would expect most personal calls to involve. Monte specified calls to the Union, to both Chizmar and to

McPartlan, all people involved at least in Monte's mind in various respects in the Union's efforts along with McPartlan. Indeed, Knorowski made a "personal call" to the Union from Respondent's phone, after Monte's unlawful assault upon her on June 18, and Monte questioned her at that time about this alleged "personal" call. Thus it is clear and I find that any concern Monte may have had about McPartlan's use of the phone for personal reasons, related solely to his belief that she was or might in the future use the phone for matters related to union business. Such a concern is of course discriminatory on its face.

Accordingly, I conclude that Respondent has not met its burden of establishing that it would have removed McPartlan's phone, absent her union activities and that its action in this regard was violative of Section 8(a)(1) and (3) of the Act. *Advertiser's Mfg., supra, Port Plasters, supra; Elizabeth Motors, supra; Stoughton Trailers, supra.*

### F. The Alleged Unlawful causing of Knorowski, Chizmar and McPartlan to be Absent from Work

I have found above that on June 18, Respondent by Monte, unlawfully assaulted Knorowski because of her union activities. Furthermore, I have concluded that Respondent violated Section 8(a)(1) of the Act by its unlawful invitations to quit directed to both Knorowski and Chizmar on that day. Moreover the record revealed that in the course of these incidents, Monte subjected both Chizmar and Knorowski to a barrage of abusive, insulting and obscene comments, as well as violently pushing a bin filled with papers off of Chizmar's desk.

In connection with Monte's abusive and obscene remarks, Respondent argues that people in the workplace are human, and the law does not require an employer to conduct himself in a mature or professional manner or even to behave reasonably and justly when he is peeved. *Christofrom and Ryder Truck Rental Inc.*, 688 F. Supp. 294, 303 (S.D.R.Y. 1987). However, while that may be so, the Board has frequently found that abusive, demeaning, or insulting remarks, where they are motivated by and directed towards employees because of their union activity, are violative of the Act. *United States Aviex Co.*, 279 NLRB 826, 831 (1986); *Bonanza Sirloin Pit*, 275 NLRB 310, 314 (1985), *Cooper-Jarrett Inc.*, 260 NLRB 1123 (1982).

Here there can be no question that contrary to Respondent's view, Monte's abusive remarks were motivated by protected conduct of the employees. As I have detailed above, Monte admitted that his annoyance with Knorowski's union activities, precipitated his rejection of her condolences, accompanied by the unlawful assault and his initial obscene and abusive comment. Monte then followed up by continuing his barrage of insults and obscenities to Knorowski because of her hysterical reaction towards his initial actions, and to Chizmar because of her protected conduct of complaining about Monte's treatment of her sister in law and fellow employee.

Both Knorowski and Chizmar left the premises immediately after these events. Knorowski was out of work until November 2, when she attempted to return. Chizmar was out of work until June 25.

Knorowski as confirmed by various doctors reports submitted herein, was suffering from an "acute anxiety

disorder." This diagnosis was confirmed by doctors reports and disability forms filled out by her own personal physician, Dr. Ellen Black, Dr. Richard Williams, Respondent's doctor whom she was required by Respondent to see, and Dr. Jacoby, the psychiatrist, whom Dr. Williams recommended to Knorowski for treatment. These documents indicate that her anxiety problems began on June 18th, the date of the incidents with Monte. The documents are also filled with references to her job situation as being the cause of her problems. This comments such the cause of disability as "upset over loss of job" and that she would "probably benefit from a return to work" by Dr. Jacoby; and Dr. Williams' remarks that Knorowski suffered from a "severe reaction overriding fear of returning to work"; all further demonstrate that Knorowski's problems were caused by Monte's conduct on June 18.

As for Chizmar, her own letter to Respondent dated June 19, indicates that she became ill and had had to leave the office due to the unprovoked and violent conduct of Monte. Subsequently doctors notes submitted by her own physician, Dr. Gerald Goldman and Dr. Williams, confirmed that Chizmar suffered from hypertension anxiety from June 18 to June 25.

Respondent argues that the above evidence is insufficient to meet General Counsel's burden of proving that the maladies suffered by the employees were caused by Respondent. Respondent contends that psychiatric injuries present complex issues of causation which are not readily determinable by lay persons. It is asserted that as a matter of law expert medical and psychiatric is

required. Respondent relies upon the following quote from *Bushman v. Holm* 798 F.2d 651 (3rd Cir. 1986):

> The correlation between certain conditions such as psychiatric illness and injury may be beyond lay knowledge. Therefore expert medical testimony should be used to aid their comprehension that a particular condition may arise out of a specific injury.

Respondent further argues that since no medical expert testified herein, and that the written reports submitted did not speak to the cause of the maladies, that General Counsel has not met its burden.

I do not agree with either Respondent's analysis of the law or the facts as to this issue. I do not believe that expert medical testimony is always an absolute necessity in establishing that psychiatric illness was caused by Respondent's unlawful conduct. Thus in *Becton Dickinson Co.*, 189 NLRB 787, 789 (1971), the Board concluded that an "acute anxiety reaction" suffered by an employee was caused by Respondent's unlawful conduct. It appears therein that the employee had passed out on the job while performing an unlawful assignment, and went to the hospital, where her condition was diagnosed as set forth above. The Board concluded, with apparently no further medical or expert testimony, that "we have reason to infer that the kind of harassment to which Respondent unlawfully subjected Hipsher did induce or in any event substantially contribute to Hipsher's anxiety reaction." 189 at NLRB at 789.[37]

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[37] See also *Greyhound Taxi, supra* where the Board sustained an ALJ's finding, again apparently absent expert

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Indeed I note that the quotation cited by Respondent in *Bushman v. Holm, supra,* is only *dicta* in a tort case, applying New Jersey tort law. Moreover, the very same case includes language that indicates that "circumstantial evidence or common knowledge may provide a sound basis from which a casual sequence may be inferred. . . . Thus as a matter of common experience, a particular act or omission might be expected under the circumstances to produce a particular result. If that result has indeed followed, it may be permissable to conclude that a casual relation exists." Id. at 659

Further, to the extent that expert medical evidence may be required to prove General Counsel's case, the record discloses that such evidence has been presented. While no medical doctor testified, the various letters and disability documents submitted by these various doctors, including a psychiatrist and Respondent's doctor adequately fulfills any such requirements. These documents make several references to work related problems of Knorowski, as well as the date of her injury as June 18. Thus this evidence coupled with the events of June 18, are more than sufficient in my view to establish a casual connection between these events and the illnesses suffered by Knorowski and Chizmar.[38]

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testimony, that an assault on an employee had "so frightened and intimidated him that he felt compelled to sever his employment relationship with Respondent." 234 NLRB at 878.

[38] As to Chizmar, she also submitted doctor's notes, include one from Respondent's own physician, diagnosing her condition as hypertension, commencing June 18.

I am of the opinion that the events of June 18, including specifically the assault on Knorowski, the knocking over of Chizmar's bin, and vile and insulting language and the unlawful invitations to quit, directed at both employees by Monte, plus the aforementioned medical evidence, is more than sufficient to establish that Respondent's conduct caused the illnesses that both employees suffered. Thus the circumstantial evidence and common knowledge herein provides a sound basis for me to find a casual connection between Respondent's conduct ad the subsequent problems that the employees encountered. *Bushman v. Holm, supra.* At the very least, the evidence permits me to conclude, which I do that the kind a harassment to which Respondent unlawfully subjected Knorowski and Chizmar, "did induce or in any event, substantially contribute" to their illnesses. *Becton Dickinson, supra.*

Thus, the above evidence establishes at a minimum a prima facie case as to causation, obligating Respondent to rebut the conclusion that its conduct has caused the illnesses of the employees. Respondent contends that it would be improper to force it to present medical evidence to refute such a claim. I again do not agree. In this case, Respondent's contention is particularly without substance, since its own physician examined the employees and in fact confirmed the diagnosis of the employees own physicians.

The only evidence presented by Respondent in any way relevant to the causation issue, revolves around its contention that the employees were engaged in an unprotected work stoppage and that was the sole reason why they went home. In fact Respondent argues that the

employees were not suffering from any maladies at all, and that they left the premises only because the Union told them to do so, in conjunction with a coordinated work stoppage. Respondent's evidence in this regard falls far short of establishing its contention. Respondent relies upon the fact that Knorowski and Chizmar left the premises only after Knorowski's conversation with union president Ferrante, and the employees admission that in fact Ferrante had suggested that they go home. Moreover, Respondent also relies upon the fact that employees McNally and Bobb both called in sick on the afternoon of the 18th, and that employee Ferrano was told by another employee that the Union instructed all employees to go home. I find the above evidence to be unpersuasive. While it is true that Ferrante advised the employees to leave the premises, such a recommendation was made obviously in recognition that Monte's disgraceful treatment of the employees, had caused hysterical and adverse reactions, and it would be best that they separate themselves from Monte. In this connection, I again note the uncontradicted evidence from the various physicians, including Respondent's own doctor, that the employees did indeed suffer from anxiety reaction and hypertension, respectively, which refutes any claim made by Respondent that the employees did not suffer from any maladies, and left the premises solely as part of a work stoppage. Moreover, the actions of Bobb and McNally have no relevance to the issue of why Knorowski and Chizmar left the premises. While it may be true that Bobb and McNally did not report for work on the afternoon of the 18th, due to a suggestion from the Union, such action

if it did occur,[39] undoubtedly was in protest of Monte's treatment of Chizmar and Knorowski, rather than as part of an overall work stoppage.

Respondent also argues that neither Knorowski nor Chizmar's actions were within the relm of a reasonable employee's reaction to Respondent's actions. Once more I cannot agree with Respondent's view. I find it quite reasonable for any employees to react as these employees did to Monte's uncivilized conduct of June 18. While if may be true, that Knorowski's being unable to work for five months might be considered by some to be an overreaction to Respondent's conduct, I note that in *Becton Dickinson, supra,* the employee involved was out of work for a period of 4 months and 8 days due to an "acute anxiety reaction." Moreover, since Respondent unlawfully set in motion the factors which gave rise to the illnesses of Knorowski as well as Chizmar, it cannot disclaim liability for their consequences. *M.F.A. Milling, supra,* at 1080; *Mary Ann's Baking Co.,* 257 NLRB 992, 993 (1983). See also *Graves Trucking, supra.*

Accordingly based on the foregoing, I conclude that Respondent has violated Section 8(a)(1) and (3) of the Act by unlawfully causing employees Knorowski and Chizmar to be absent from work, as a result of Monte's conduct of June 18.

However, I am unable to make a similar finding with respect to McPartlan's actions in leaving work. Although on June 23, the evidence does establish that she indeed suffered from "gastroenteritis" during her absence from

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[39] I note the hearsay nature of the evidence in this regard.

Respondent, I do not find that General Counsel has established a casual connection between that illness and any unlawful conduct committed by Respondent. While McPartlan on June 23, was aware that her aunt had been assaulted on June 18, I find her alleged fear of also being assaulted by Monte to be unreasonable, and insufficiently connected to the removal of her telephone. I note particularly that McPartlan admitted that she did not begin to suffer any symptoms of gastroenteritis on June 23, until after the arrived home and after she decided to leave the premises.

While I have found that Respondent's action in removing McPartlan's phone on June 23 was unlawfully motivated, I find it was not connected to her subsequent illness. Moreover, I believe that she did not act reasonably when she left the premises, because she was "upset" about this action, and or Monte's prior confrontation with her aunt.

Therefore, I shall recommend dismissal of the allegation of the complaint that alleges that Respondent unlawfully caused McPartlan's absence from work on June 23.

### G. Respondent's Requiring Employees to Submit Medical Verification for Absences

Section 8(a)(1) and (3) of the Act is violated when an Employer changes its policies with respect to sick leave and medical verification, because of its employees union activities. *Interstate Transport Security*, 240 NLRB 274, 279 (1979); *Brown & Connolly, Inc.*, 237 NLRB 271, 280 (1978).

Once again the evidence discloses a strong prima facie case that Respondent's decision on June 23 to require employees Knorowski, Chizmar and McPartlan to be examined by Respondent's physician, before agreeing to pay them sick leave, was motivated by these employees protected conduct.

It is undisputed that Respondent had no past practice, policy or requirement that employees even submit a doctor's note to obtain sick leave payment, much less to be examined by the company doctor. I note herein that the employees herein submitted or agreed to submit notes from their own doctors, documenting their illnesses, but this was deemed not sufficient by Respondent.

Thus, this unprecedented action by Respondent, coupled with its timing, the aforementioned evidence of Respondent's antiunion animus and previous unfair labor practices,[40] leads to the finding, that it's decision was motivated by the protected conduct engaged in by these three employees.

The burden once more falls upon Respondent to establish that it would have taken the same action against the employees, absent their union activities. Respondent contends that it acted solely because it had a reasonable suspicion that the employees were engaged in a concerted sick out, and were not really ill. Respondent points

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[40] I note particularly Monte's unlawful invitations to employees to quit, his statement that he intended to "get rid of the whole family", and his assault and abusive remarks on June 18.

to the fact that Chizmar, Knorowski and McPartlan all left work immediately after a confrontation with Monte, claiming to be sick, but apparently in good health. Moreover, on June 18, when Chizmar and Knorowski left, their departure was preceded by a phone conversation with the union president. Finally, it is urged that the other two employees, Bobb and McNally did not report for work on the afternoon of June 18, also claiming to be sick, but came to work the next day apparently in good health.

It is submitted by Respondent that these facts created in Respondent's mind a reasonable belief that a concerted sick out was in progress and that the employees were not ill. Therefore, it was within its rights to demand that the employees support their assertion of illness. *Charge Card Assn. v. NLRB*, 653 F.2d 272, 275 (6th Cir. 1981).

While Respondent's argument does have some surface appeal, I do not believe that in the circumstances of this case, it can prevail. While I agree that the aforementioned facts may have presented Respondent with a reasonable suspicion that a sick out was in progress, it must be emphasized that it was Respondent's unlawful conduct that created the situation. Thus it was Monte's unlawful conduct on June 18 of assaulting Knorowski, and illegally threatening and verbally abusing Knorowski and Chizmar, that set in motion the chain of events that caused the employees to leave, culminating in the subsequent events which gave rise to Respondent's allegedly "reasonable" belief. Thus in effect Respondent's suspicions that employees were engaged in a work stoppage or a sick out, was the direct result of its own unlawful conduct. In those circumstances, I do not believe that it has shown that it would have taken the same action

against the employees, absent their union and protected activities, and that therefore Respondent by its requiring employees to submit to medical examination by its doctor, violated Section 8(a)(1) and (3) of the Act. *Brown & Connolly, supra; Interstate Transport, supra.*

### H. The Discharge of McPartlan

I have found above that Respondent violated Section 8(a)(1) and (3) of the Act by changing McPartlan's hours from part time to full time on June 1. McPartlan was able to adhere to the new schedule during the summer months, due to her own vacation, as well as the fact that her children were attending summer camp. However in September, when her children resumed school, it was no longer feasible for McPartlan to comply with an 8:30 a.m. to 5:00 p.m. schedule. Therefore she spoke to Monte about her problem and reminded him of Respondent's past history of accommodating her by permitting her to work 9:00 a.m. to 3:00 p.m. Monte refused to agree, adding "with all the union stuff that's going on, there's no way I could help you."

Subsequently a series of letters between McPartlan and Respondent were exchanged about the problem, and McPartlan unilaterally began working her old hours on September 15. After two warning letters, McPartlan wrote back asserting she would be forced to leave if Respondent insisted on her working full time hours, and accusing Respondent's by refusing to accommodate her of committing an unfair labor practice.

The response to this letter, was a termination letter dated September 17, alleging that McPartlan was guilty of

"flagrant disregard for company rules", and "willful misconduct."

In ordinary circumstances, Respondent's position might have some merit. Indeed, there is no question that McPartlan disobeyed Respondent's directives as to her working hours, conduct which normally would be considered insubordination and warranting discharge. However in this case, the instructions or orders that McPartlan disobeyed were unlawfully motivated, in that the change in McPartlan's hours was discriminatory as I have found above. In those circumstances, McPartlan's refusal to accept an unlawful assignment does not constitute insubordination justifying her discharge. *Hilton Hotels Corp.*, 282 NLRB No. 126 ALJD slip op. p. 33-40; *Superior Warehouse Grocers*, 277 NLRB 18, 23 (1985); *Nissen Foods Inc.*, 272 NLRB 371, 401, 402 (1984).

The refusal by Respondent to accommodate McPartlan's request to return to her previously agreed to working hours, followed by its discharge for failure to work such hours, is clearly violative of the Act. *S.S. Kresge Co.*; 199 NLRB 303, 306 (1972); *Michiel's Inc.*, 279 NLRB 109, 122 (1986); *Hilton Hotels, supra, Nissen Foods, supra.*

Respondent argues however, that McPartlan should not be permitted to engage in "self help", by unilaterally changing her own hours, particularly since the Region had issued a complaint on August 7, alleging in part that her change in hours was violative of the Act. Respondent claims that McPartlan must permit the Board's processes of remedy her claim, and cannot unilaterally change her

hours. I cannot agree that the Board's issuance of complaint in any way affects the above analysis, nor eliminates McPartlan's right to refuse an unlawfully motivated work assignment.

Indeed, McPartlan would have been perfectly within her rights to quit her job because of such an unlawful change of working hours. Such a quit would be considered by the Board to be a constructive discharge, and also violative of Section 8(a)(1) and (3) of the Act. *Bennett Packaging Co., of Kentucky Inc.*, 285 NLRB No. 80 slip op. p. 2 (1980) (Starting time of employees changed, where Employer had allowed her to report to work late because of her babysitting problems.) *Magnolia Manor Nursing Home Inc.*, 260 NLRB 377, 387, (1982) (Employee's shift changed by Employer, who was aware that employee had to take care of small child at home and could not work that shift.) *St. Joseph's Hospital*, 247 NLRB 869, 880 (1980) (Employer refused request of employee to work part time to attend school); *St. Paul's Church, supra* at 1252-1255 1985) (Imposing policy of working "every other weekend" to employees knowing employees could not comply with rule); *Olympic Limousine Service*, 278 NLRB 932, 938-9 (1986) (Discontinuance of night shift, knowing that employee needed an evening job in order to attend school.)

Therefore since McPartlan would have been constructively discharged had she quit because of Respondent's actions, it follows that her decision to remain on the job, but at her old prediscrimination hours, does not warrant a different result, notwithstanding the issuance of a Board Complaint covering the unlawful change of hours.

Accordingly, based on the foregoing analysis and authority, I conclude that Respondent's decision to discharge McPartlan on September 17 was violative of Section 8(a)(1) and (3) of the Act.

### I. The Layoff of Knorowski

On November 2, Knorowski reported for work at Respondent's premises, following her period of disability wherein she was suffering from an acute anxiety reaction. Respondent notified her at that time that she was being laid of as of November 2, since her position had been filled.

Since I have found that Knorowski's acute anxiety reaction was unlawfully caused by Respondent's conduct, it follows that Respondent may not turn her down when she applied for reemployment. *MFA Milling, supra* at 1079, 1080, 1002, *Fabric Mart, supra; Cf. Graves Trucking, supra,* where no reinstatement was ordered, only because the employee had not been discharged or otherwise refused the opportunity to return to work.

Therefore Respondent has violated Section 8(a)(1) and (3) of the Act by laying Knorowski off on November 2, even though it had hired a replacement to fill her position.

Moreover, assuming that Respondent's conduct on June 18 did not unlawfully cause Knorowski's absence, Respondent's action on November 2 is still subject to scrutiny. In those circumstances, it is necessary to once again analyze the situation under *Wright Line* principles. Once more, it is concluded that General Counsel has

established that a motivating factor in Respondent's decision to layoff Knorowski on November 2, was her union activities. In that connection Respondent admitted that it believed Knorowski was a strong union adherent, because of her "family culture" to the extent that Monte did not even bother to attempt, as he did with other employees, to persuade her to abandon her union support. Further, Monte unlawfully invited Knorowski to quit on June 18, and threatened to "get rid of the whole family", after he had already unlawfully discharged Helen Chizmar and McPartlan. Therefore, Knorowski, as of November 2, was only one of two remaining members of the Chizmar family who had not been unlawfully discharged. Finally, Respondent had already unlawfully discriminated against Knorowski, by changing her hours on June 1, several weeks before her disability commenced.

Having found a prima facie of union discrimination present, the burden then shifts to Respondent to establish by a preponderance of the evidence, that it would have taken the same action against Knorowski, absent her union activities. I find that Respondent has fallen short of meeting this burden of proof.

Respondent's position essentially is that it did not know whether Knorowski ever intended to return to work at Respondent, and that it needed to fill her position. I find this explanation to be unpersuasive. While I find the testimony of Lucania and Monte, that because of the incidents on June 18 they did not believe that Knorowski would be returning, to be credible, I do not find in dispositive. In my view, if Respondent were truly concerned about whether Knorowski would be returning,

it would have been a simple matter to call her on the phone and ask her. Yet they chose not to do so, because as Monte himself testified "I didn't want to go near that." Thus Respondent has absolutely no desire to see Knorowski return to work, because of her union activities and I believe made no phone call to ascertain such desires, for the same reasons. If no such union activities had occurred, I conclude that Respondent would have in fact made such an inquiry, before replacing a long time well evaluated employee such as Knorowski.

Furthermore, Respondent's past practices with respect to these kinds of cases, demonstrate more forcefully the pretextual nature of Respondent's defense. Lucania admitted that when an employee returns from disability, "in most cases", Respondent takes the employee back when they finally recover. As Lucania further admitted, "the nature of our operations, we can be flexible and re-schedule and move people around." An examination of several past cases, bears out and supports Lucania's candid testimony in this regard.

Indeed, Respondent could point to no past situations, where it refused to offer a position to an employee returning from disability. In fact to the contrary, testimony was adduced with respect to several prior cases, including a situation involving Knorowski herself, where employees out on various kinds of disability were reemployed at their old jobs when they were ready to return to work.

The treatment that Respondent accorded employees Cesar Gonzalez and Mike Battaglia is even more revealing. Gonzalez was a plant employee, who was out of

work for a year because of an injury on the job. His position was filled within two months. When Gonzalez attempted to return to work, consistent with Respondent's policy of flexibility as testified to by Lucania, he was offered a job in a different position. However, it turned out that Gonzalez was not physically able to handle the alternative position, he went back on compensation.[41]

Respondent argues that comparison between plant employees such as Gonzalez with Knorowski is inappropriate, because "those employees have leave of absence rights guaranteed by their collective bargaining agreement and because the replacement of plant employees is impacted by the bidding rights of current employees as specified in the collective bargaining agreement." However the record contains no support for Respondent's assertions in this regard. The collective bargaining agreement covering Respondent's plant employees was not introduced into the record. Nor does the record include any testimony or other evidence to indicate what leave of absence rights if any are guaranteed to plant employees or what impact bidding rights has upon replacement of employees. Moreover, no evidence was adduced that when Gonzalez was offered a different position, when he sought to return, and job bidding was required by him, or that the collective bargaining agreement in any way motivated Respondent's decision to make such an offer.

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[41] Eventually, Gonzalez was terminated by Respondent, but only because he refused to undergo a myelogram as recommended by respondent's Insurance Company doctors.

Respondent contends and I agree that the most comparable case to that of Knorowski is that of Lab Technician, Mike Battaglia. However I do not agree with Respondent's view that its treatment of Battaglia was consistent with its treatment of Knorowski. Thus Battaglia was initially out on a leave of absence for a year commencing in the Spring of 1985. His job was held open for him for that period of time, and he was allowed to return to his old job in the Spring of 1986. In February of 1987, Battaglia sustained a second back injury, and was out of work until July or 1987.

Battaglia's position as a Lab Technician was filled during the period of his second disability. Respondent received a letter from its Insurance Company indicating that Battaglia could return to work, but at a lighter duty than before. At that point, in further demonstration of Respondent's admitted flexibility" in "moving people around", and its policy of in "most cases" taking people back when they return from disability, created a new job for Battaglia. Thus he was rehired as a "gofer" and a chauffeur for Mr. Spiegelhalder.

Yet when Knorowski notified Respondent that she was ready to return to work, no such courtesies were extended to her, and in fact Lucania admitted that no discussion ever took place between he and Monte about according similar treatment to Knorowski. Thus Monte made no inquiry of Lucania, as to whether it might be feasible to either "create" a job for Knorowski, or find sufficient work for her to perform. I note that the accommodation that Respondent made for Battaglia occurred in July of 1987, only a few months before Knorowski sought to return. Moreover, when Chizmar on behalf of

Knorowski reminded Respondent of its treatment of Battaglia as compared to Knorowski, Monte's response was quite revealing. He replied that Battaglia had notified Respondent that he sought to return, and that he (Monte) didn't even know if Knorowski wanted her job back. This response merely reinforces the conclusion that Respondent's defense is pretextual. Thus as Chizmar pointed out to Monte, he didn't give Knorowski much of a chance, since he began advertising for employees on July 4, and hired two employees during the month of July. More significantly, Respondent was first notified in early September that Knorowski was intending to return on November 2. Thus contrary to Monte's response to Chizmar, Respondent knew full well that Knorowski was going to be able to return to work on November 2. Monte and Lucania during the period of the time between September and November, discussed with Respondent's attorney what position to take when she returned, and concluded that it would not offer her a position, but merely place Knorowski on a preferential hiring list. However, there was not even any discussion between Monte and Lucania about the possibility of finding something to do or "creating" a job for Knorowski, as it had done for Battaglia. I am persuaded that the reason that Respondent did not make a similar accommodation for Knorowski, as it had for Battaglia and consistent with its prior practice and policies, was not as Monte falsely stated, that Knorowski hadn't informed Respondent of her desire to return,[42] but because Knorowski had along

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[42] As noted, Respondent had nearly two months notice of Knorowski's desire to return to work.

with the other members of Chizmar family, been responsible for unionizing Respondent's clerical staff.

Accordingly, Respondent has not met its burden of establishing that it would have laid off Knorowski, thereby retaining two less senior employees,[43] absent her union activities. Therefore, even apart from Respondent's unlawful causing of Knorowski's absence, it has violated Section 8(a)(1) and (3) of the Act when it failed to reemploy her when she requested to return to work after her disability was concluded. *Palomar Transport Inc.*, 266 NLRB 510, 512, 513 (1983); *WXON TV Inc.*, 289 NLRB No. 80 slip op. p. 10-13 (1988); *Advanced Mining Group Div. of Republic Corp.*, 260 NLRB 486, 502 (1982); *Dravo Corp.*, 255 NLRB 584, 589, 590 (1981); *GTE Automatic Electric Co.*, 204 NLRB 716, 731 (1973).

**Conclusions of Law**

1) Respondent Kenrich Petrochemicals Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2) Local 8-406, Oil, Chemical and Atomic Workers, International Union, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3) Respondent violated Section 8(a)(1) of the Act by threatening its employees with more onerous working conditions or the imposition of the use of timeclocks,

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[43] See *Premoco Forge Inc.*, 224 NLRB 371, 373 (1976).

with loss of existing benefits, or with unspecified reprisals, because of their activities on behalf or support for the Union.

4) Respondent violated Section 8(a)(1) of the Act by inviting employees to quit their employment, because of such employees exercise of activities on behalf of the Union or other protected conduct, thereby threatening them with discharge by implying that support for the Union and or the exercise of other protected conduct and continued employment with Respondent are not compatible.

5) Respondent violated Section 8(a)(1) of the Act by terminating the employment of Helen Chizmar because of the Union activities of her relatives.

6) Respondent violated Section 8(a)(1) and (3) of the Act, by changing the working hours of Barbara Knorowski and Karen McPartlan, on June 1, assaulting Knorowski on June 18, removing McPartlan's telephone on June 23, requiring McPartlan, Knorowski and Catherine Chizmar to be examined by Respondent's physician on June 23, causing Knorowski and Chizmar to be absent from work subsequent to June 18, discharging McPartlan on September 17, and by laying off and refusing to reemploy Knorowski on November 2, all because said employees engaged in activities on behalf and in support of the Union.

7) The aforesaid unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

8) The Respondent did not engage in any other unfair labor practices alleged in the consolidated complaint.

## V. The Remedy

Having found that Respondent engaged in unfair labor practices in violation of Section 8(a)(1) and (3) of the Act, I shall recommend that Respondent cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent violated Section 8(a)(1) of the Act by terminating Helen Chizmar, on May 29, and Section 8(a)(1) and (3) of the Act by laying off and refusing to reemploy Barbara Knorowski on November 2, and by discharging Karen McPartlan on September 17, I shall recommend that that it be ordered to offer Knorowski and Chizmar immediate and full reinstatement[44] to their former positions of employment, or if these positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges, and to make whole Knorowski, Chizmar and McPartlan, any loss of earnings that they may have suffered. Loss of earnings shall be computed in the manner prescribed in *F.W. Woolworth*, 60 NLRB 289 (1950), and shall include interest as computed in *New Horizons for the Retarded*, 283 NLRB No. 181 (May 28, 1987).

I have also found that Respondent violated Section 8(a)(1) and (3) of the Act by causing the absences from

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[44] Since McPartlan was subsequently reinstated by Respondent, it is not necessary to order her reinstatement.

work of Knorowski and Catherine Chizmar, subsequent to June 18. Since Respondent unlawfully set in motion the events which gave rise to these absences, it is appropriate to order Respondent to make Knorowski and Catherine Chizmar whole for pay lost subsequent to June 18 as a result of illnesses fairly attributable to Respondent's conduct. *Becton Dickinson, supra* at 789; *Fabric Mart, supra* at 390; *MFA Milling, supra* at 1080; *Graves Trucking, supra* at 345.

I shall leave to the compliance stage of this preceding, the extent to which the receipt by these employees of sick leave payments by Respondent, and or disability payments from Respondent's insurer, during the period of their absences, shall be deducted from their backpay. *Cf. Graves Trucking, supra,* footnote 11; *American MFG. Co. of Texas,* 167 NLRB 520, 523, footnote 13 (1967).

Respondent shall also be ordered to expunge from its files any reference to the discharges of Helen Chizmar, McPartlan, and the layoff of Knorowski, and notify these employees in writing that this has been done and that evidence of such actions will not be used by Respondent as a basis for any future action against them. *Sterling Sugars Inc.,* 261 NLRB 472 (1982).

Finally to the extent that it has not already done so, it is appropriate to require Respondent, to remedy its unlawful change of hours for McPartlan and Knorowski, to restore these employees to their schedules that existed prior to June 1.

Upon the foregoing findings of fact, conclusions of law, and the entire record, and pursuant to Section 10(c) of the Act I hereby issue the following recommended:[45]

## Order

Respondent Kenrich Petrochemicals Inc., its officers, agents, successors and assigns shall:

1. Cease and desist from:

(a) Threatening its employees with more onerous working conditions, or the imposition of the use of timeclocks, with the loss of existing benefits, or with any other unspecified reprisals, because of their activities on behalf or support for Local 8-406, Oil Chemical and Atomic Workers International Union, AFL-CIO, herein called the Union.

(b) Inviting employees to quit their employment, because of such employees exercise of activities on behalf of the Union or other protected conduct, thereby threatening them with discharge by implying that support for the Union or the exercise of other protected conduct and continued employment with it are not compatible.

(c) Discharging supervisors because of the protected activities of relatives in order to coerce employees

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[45] If no exceptions are filed as provide by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

in the exercise of the rights guaranteed by Section (7) of the Act.

(d) Discharging, laying off, changing the working hours, assaulting, removing telephones, and requiring medical verification for illnesses of its employees, because of its employees support for or activities on behalf of the Union.

(e) In any like or related manner interfering with, restraining or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Offer Helen Chizmar, and Barbara Knorowski immediate and full reinstatement to their former positions of employment, or if these positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges previously enjoyed.

(b) Make whole Helen Chizmar, Barbara Knorowski, Karen McPartlan and Catherine Chizmar for any loss of earnings and other benefits suffered by them as result of the discrimination against them, in the manner set forth in the remedy section of this Decision.

(c) Restore the hours and schedule that existed prior to June 1, 1987 for Karen McPartlan and Barbara Knorowski.

(d) Remove from its files any reference to the discharges and or layoffs of Helen Chizmar, Karen McPartlan and Barbara Knorowski, and notify these employees in writing that this has been done, and that

evidence of these unlawful actions will not be used against them in any way.

(e) Preserve and upon request, make available to the Board or its agents for examination and copying, all payroll records, social security payments records, timecards, personnel records and reports and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at the Bayonne, New Jersey facility copies of the attached notice marked "Appendix."[46] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[46] If this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER of the national labor relations board."

(h) IT IS FURTHER ORDERED that the Complaint be dismissed insofar as it alleges violations not specifically found.

Dated: Washington, D.C. December 30, 1988

/s/ Steven Fish
Steven B. Fish
Administrative Law Judge

## APPENDIX

## NOTICE TO EMPLOYEES

**Posted by the Order of**
**National Labor Relations Board**
**An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten our employees with more onerous working conditions, or the imposition of the use of timeclocks, with the loss of existing benefits, or with any other unspecified reprisals, because of their activities on behalf or support for Local 8-406, Oil Chemical and Atomic Workers International Union, AFL-CIO, herein called the Union.

WE WILL NOT invite our employees to quit their employment, because of such employees exercise of activities on behalf of the Union or other protected conduct, thereby threatening them with discharge by implying that support for the Union or the exercise of other protected conduct and continued employment with us are not compatible.

WE WILL discharge supervisors because of the Union or other protected activities of their relatives or in order to coerce employees in the exercise of the rights guaranteed by Section (7) of the Act.

WE WILL NOT discharge, lay off, change the working hours, assault, remove telephones, or require medical verification for illnesses of our employees, because of our employees support for or activities on behalf of the Union.

WE WILL NOT in any like or related manner interfere with, restrain or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL offer Helen Chizmar, and Barbara Knorowski immediate and full reinstatement to their former positions of employment, discharging, if necessary anyone who was hired to perform the work that these employees had been performing, or if these positions no longer exist, to substantially equivalent positions, without prejudice to their seniority and other rights and privileges previously enjoyed.

WE WILL make whole Helen Chizmar, Barbara Knorowski, Karen McPartlan and Catherine Chizmar for any loss of earnings and other benefits suffered by them as result of our discrimination against them, plus interest.

WE WILL restore the hours and schedule that existed prior to June 1, 1987 for Karen McPartlan and Barbara Knorowski.

WE WILL remove from our files any reference to the discharges and or layoffs of Helen Chizmar, Karen McPartlan and Barbara Knorowski, and notify these

employees in writing that this has been done, and that evidence of these unlawful actions will not be used against them in any way.

KENRICH PETROCHEMICALS INC.
(Employer)

Dated: _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's office, Region 22, 970 Broad Street, Room 1600, Newark, New Jersey, 07102, TEl. No.: 201-645-3652.

JD(NY) – 96 – 88
Bayonne, N.J.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK CITY BRANCH

| | |
|---|---|
| KENRICH PETROCHEMICALS, INC. | |
| and | |
| LOCAL 8-406, OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO | Case 22-CA-15105 |
| KAREN MCPARTLAN, An Individual | Case 22-CA-15258 |
| BARBARA KNOROWSKI, An Individual | Case 22-CA-15319 |

ERRATUM

The Decision issued by the undersigned on December 30, 1988, in order to correct a typographical omission, and to conform the recommended order to the recommended notice is hereby amended as follows:

In Paragraph four of said notice, insert the word NOT between Will and discharge.

Dated: Washington, D.C. January 17, 1989.

/s/ Steven Fish
Steven B. Fish
Administrative Law Judge

## APPENDIX C

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

| | |
|---|---|
| KENRICH PETROCHEMICALS, INC. | |
| and | |
| LOCAL 8-406, OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL–CIO | Case 22-CA-15105 |
| KAREN MCPARTLAN, an Individual | Case 22-CA-15258 |
| BARBARA KNOROWSKI, an Individual | Case 22-CA-15319 |

DECISION AND ORDER

On December 30, 1988, Administrative Law Judge Steven B. Fish issued the attached decision. [Appendix B] The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to

affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order.

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Kenrich Petrochemicals, Inc., Bayonne, New Jersey, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

To the extent there are inconsistencies in the testimony regarding the 8(a)(1) statements made by the Respondent's president (Monte), we note that the judge's findings on these issues reflect his implicit crediting of the testimony that supports those findings.

We also note that the citation to *Mississippi Chemical Corp.*, in sec. IV,A, of the judge's decision is incorrect. The citation should read 280 NLRB 413, 417 (1986).

[2] In adopting the judge's conclusion that the Respondent violated the Act by discharing Helen Chizmar, we agree with the judge that the asserted conflict of loyalty argument was pretextual (a finding that buttresses the evidence that she was discharged for antiunion motives) and that the Respondent failed to establish a legitimate reason for the discharge.

Dated, Washington, D.C. May 31, 1989.

James M. Stephens, Chairman

Wilford W. Johansen, Member

John E. Higgins, Jr., Member
NATIONAL LABOR RELATIONS
BOARD

(SEAL)

## APPENDIX D

Filed January 29, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 89-3392, 89-3500

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KENRICH PETROCHEMICALS, INC.
*Petitioner/*
*Cross-Respondent*

v.

NATIONAL LABOR RELATIONS BOARD,
*Respondent/*
*Cross-Petitioner*

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On Petition for Review from the
National Labor Relations Board
(N.L.R.B. Nos. 22-CA-15105, 22-CA-15258,
and 22-CA-15319)

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Argued December 14, 1989

BEFORE: STAPLETON, GREENBERG,
AND GARTH, *Circuit Judges*

(Filed January 29, 1990)

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National Labor Relations Board
1717 Pennsylvania Ave., N.W.
Washington, D.C. 20570
*Attorneys for Respondent/*
*Cross-Petitioner*

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OPINION OF THE COURT

GREENBERG, Circuit Judge.

BACKGROUND

Petitioner Kenrich Petrochemicals, Inc. seeks review of a final order entered on May 31, 1989, in which the National Labor Relations Board held that Kenrich committed a host of unfair labor practices in response to its clerical workers' decision to unionize. Specifically, Kenrich challenges the Board's decision that its discharge of supervisor Helen Chizmar violated section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1), because it was in retaliation against her relatives for participating in the union campaign. Kenrich asserts as well that the Board erred when it found that it violated sections 8(a)(1) and (3) of the Act when its president physically assaulted employee Barbara Knorowski, causing Knorowski and a co-worker, Catherine Chizmar, to be

absent from work, and when Kenrich refused to reinstate Knorowski following a four month disability leave. Finally, Kenrich contends that the Board erred in its finding that the discharge of union steward, Karen McPartlan, violated sections 8(a)(1) and (3) because she was discharged for her refusal to comply with an unlawful change in her work hours. The Board has cross-petitioned for enforcement of its order. The Board did not write a separate opinion. Rather it adopted an order of an administrative law judge whose decision and order were dated December 30, 1988.

We agree with the Board that Helen Chizmar's discharge violated section 8(a)(1) of the Act but deny enforcement of its order that Chizmar be reinstated with backpay, as we fail to see how the order serves any legitimate remedial purpose. We have decided to reserve judgment on the lawfulness of Karen McPartlan's discharge but will remand the matter to the Board for further consideration of Kenrich's liability and the enforceability of the Board's selected remedy. In all other respects, under the appropriate standard of review, we find no basis to disturb the order of the Board. Thus, to the foregoing extent regarding Helen Chizmar the petition for review will be granted but, with the exception of our remand regarding Karen McPartlan, it will otherwise be denied.

## FACTS

Kenrich Petrochemicals, Inc. is a Delaware corporation headquartered in Bayonne, New Jersey, engaged in the sale and manufacture of various chemical products.

Kenrich's President is Salvatore Monte, its Vice-President is his wife, Erica Monte, and its Vice-President of Operations is Charles Lucania. For approximately 20 years prior to the events in question, Kenrich's production workers have been represented by Local 8-406, Oil, Chemical and Atomic Workers International Union AFL-CIO. This petition for review concerns the organizational activities of Kenrich's clerical staff.

As of May, 1987, Kenrich's clerical staff consisted of seven employees: Barbara Knorowski, Catherine Chizmar, Karen McPartlan, Michelle Bobb, Marge McNally, Judy Kobryn and Linda Ferrano. These individuals were directly supervised by office manager Helen Chizmar. Helen Chizmar is Knorowski's sister, McPartlan's mother, and Catherine Chizmar's mother-in-law.

In May, 1987, all of the clerical employees signed authorization cards at Local 8-406's office designating the union as their bargaining representative. On May 21, 1987, the employees notified Helen Chizmar of their decision to unionize and, the following day, Kenrich received a letter from the union requesting recognition. On May 26, 1987, the union filed a petition with the Board seeking certification as the employees' representative.

Monte testified that he "felt . . . betrayed" when he received the union's letter requesting recognition. He assessed Kenrich's chances for defeating the union's organizational drive and concluded that Barbara Knorowski and Karen McPartlan would prove to be firm union supporters because unionization was "in the family culture." App. at 394.[1] He was unconcerned about Linda

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[1] The production workers' former shop steward, Frank Sakowski, is Knorowski's father and McPartlan's grandfather.

Ferrano's and Judy Kobryn's sentiments toward the union because he had already determined to make Linda Ferrano his confidential secretary, thus rendering her ineligible for the union, and Judy Kobryn was leaving Kenrich. Accordingly, Monte decided that McNally, Bobb, and Catherine Chizmar would be the swing votes in any Board election.

On June 3, 1987, Salvatore and Erica Monte and Kenrich's founder, Eric Spielgelhalder, met with McNally, Bobb and Catherine Chizmar to attempt to dissuade them from supporting the union. The three employees were not receptive to Kenrich's arguments. About a week later, Monte, in a private conversation with Catherine Chizmar, reiterated Kenrich's position and again was rebuffed. After that conversation, Monte became convinced that unionization of the clerical staff was inevitable and therefore, on June 16, 1987, he authorized Kenrich's offer of voluntary recognition of the bargaining unit pending a card count. The union rejected this offer, insisting instead on a Board election. The union prevailed in an election held on July 2, 1987 and was certified on July 10, 1987.

1. *Helen Chizmar's Discharge*

As noted above, the clerical employees informed their supervisor, Helen Chizmar, of their decision to unionize on May 21, 1987, the day before Kenrich received the union's request for recognition. Helen Chizmar testified that she was "shocked" when she learned of the organizational drive but that she did not inform other managers of the drive because she felt that it would be futile to raise the issue, given that Kenrich would receive

the union's letter the following day. Also, she feared that Monte would suspect that she was involved in the employees' union activities if she spoke to him about the matter.

After Kenrich received the union's letter, Lucania called Helen Chizmar and several other managers to his office to discuss Kenrich's prospects for defeating the union campaign. During the meeting, Lucania showed Chizmar the letter and stated, "[h]ere, read the letter, but you probably know all about it already." To this, Chizmar said nothing. Lucania informed the managers that Kenrich was somewhat pessimistic about its prospects for defeating the union, because the employees' decision was unanimous.

Helen Chizmar testified that she became apprehensive about her job security after she learned that her three relatives, Knorowski, McPartlan and Catherine Chizmar, had signed authorization cards. On May 29, 1987, her fears materialized for at the end of the day, Monte discharged her without warning. That same day, Kenrich had received notice of the petition the union had filed with the Board seeking recognition on the basis of the card count.

Monte's purported reasons for Helen Chizmar's discharge were somewhat inconsistent. At the time of the discharge, he told her that Kenrich could no longer afford to pay her salary: "[w]e have to let you go, Helen. We just can't afford you anymore. You're making, we think we can get somebody for $20,000 less and that's what we plan to do." Later that same day, Monte told Kenrich's buyer and admitted agent, Jill Bernicker, that he had

discharged Chizmar because "[he] couldn't keep her for financial reasons and [he] was not going to put up with any union bullshit." In early June, he told Catherine Chizmar that "[he] had to fire Helen because she couldn't do the technical end of her job."[2] In a subsequent conversation, he told Catherine that he had fired Helen "because [he] couldn't afford her and no matter what [he] did for her, she was never happy."

At the hearing, Monte insisted that he terminated Helen Chizmar because it would be impossible for her to manage a bargaining unit which included three of her close relatives without compromising her loyalty to Kenrich:

> [h]ere was going to be my office manager managing an office full of relatives, and there was no way she could properly represent me. It created a tremendous conflict of interest in my mind. How was this woman going to manage her own relatives? . . . I saw no way but to get rid of her.

App. at 409-10. Monte indicated that his concern about Helen Chizmar's conflict of loyalties was heightened by the fact that she had previously shown favoritism toward her relatives. In addition, he believed that Chizmar had advance notice of union organizing activity and had acted disloyally in failing to disclose that information to him.

2. *The June 18 Incident and Knorowski's Layoff*

Salvatore Monte's father died in Florida on June 14, 1987. Before leaving for the funeral, he instructed counsel

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[2] At the hearing, Monte testified that Helen Chizmar's discharge was unrelated to her job performance. App. at 469.

to inform the union that Kenrich would voluntarily recognize it on the basis of a card count. While in Florida, he repeatedly contacted his office and became infuriated when he learned that Barbara Knorowski, along with other employees, had been attempting to persuade Linda Ferrano to support the union.

Upon Monte's return to the office on June 18, 1987, Knorowski approached him in a narrow corridor and, clasping his hand, attempted to express her condolences for his father's death. Monte pushed Knorowski's hands away, stated that he did not "want [her] fucking condolences," and continued walking down the hallway, knocking her against a filing cabinet. Knorowski immediately became hysterical and began crying, "he hit me, he hit me."

Still hysterical, she returned to her desk and informed Catherine Chizmar about the incident. Unable to calm Knorowski, Catherine Chizmar telephoned the production workers' shop steward, Bob McClean, for assistance. Monte then entered the office and, observing that Knorowski was still crying, asked, "[w]hat the hell's wrong with you[?]" Chizmar questioned Monte why he had pushed Knorowski and he replied that "it [was] none of [her] fucking business." Chizmar called Monte a "bastard" and a "hypocrite" and he countered that if she did not like the way he ran his business, she could "get the fuck out." He proceeded to push a bin of papers off Chizmar's desk and call Knorowski a "fucking cunt."

Around that time, Bob McClean arrived and asked Monte what had happened. Monte responded, "You know what happened. Monte responded, "You know

what happened. It's got to do with this f'ing union." After McClean left, Al Ferrante, the union's President, telephoned Knorowski and, upon overhearing Monte utter additional profanities, recommended that Knorowski and the other clerical employees leave the office. Both Catherine Chizmar and Knorowski informed Monte that they were sick and went home.[3] Before their departure, Monte made a second reference to the union, stating "[y]ou guys have no idea what the hell you're getting in with the fucking union."

The following day, Catherine Chizmar was examined by her personal physician, who provided her with a note which stated that she would be unable to resume work until June 25, 1987 "due to an acute exacerbation of her hypertension and an anxiety related situation." On June 19 and June 23, Knorowski's husband called Lucania to inform him that Knorowski was ill and under a doctor's care, and that he did not know when she could return to work. On or about June 22, 1987, Kenrich received a note from Knorowski's physician which stated that she would be unable to work until further notice.

On June 23, Kenrich sent mailgrams to Catherine Chizmar and Knorowski in which it accused them of faking their illnesses and advised them that they would not receive any pay for their sick days unless they submitted to an examination by Dr. Williams, a physician selected by Kenrich. On June 25, Dr. Williams examined the employees and issued 'disability certificates' for

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[3] Two other clerical employees, Marge McNally and Michelle Bobb, called in sick in the afternoon. App. at 523. Karen McPartlan was on vacation at the time.

them. Knorowski's certificate stated that she was "partially incapacitated from 6/18/87 to indefinite" due to an "acute anxiety neurosis" and that she had been referred to a psychiatrist, Dr. Jacoby. Chizmar's certificate stated that she had been incapacitated from June 18 to June 25, and that her hypertension had been controlled. Following its receipt of Dr. Williams' certificates, Kenrich paid the employees for their sick days, and Catherine Chizmar returned to work without incident on June 25.

Kenrich was dissatisfied with Knorowski's original doctor's note because it did not state the nature of her illness or her anticipated date of return. Dr. Williams informed Lucania that Knorowski was "in very bad shape" and required psychiatric care. By letter dated July 1, 1987, Knorowski's personal physician, Dr. Black, informed the company that Knorowski was suffering from an "acute anxiety disorder" and that her "[p]rogress [was] guarded." The letter did not, however, specify her return date.

On July 4, Kenrich placed a newspaper advertisement for a sales order clerk and hired Barbara Mateland on July 27 to replace Knorowski. Kenrich also hired about four other clerical employees during June and July. Neither Monte nor Lucania contacted Knorowski before hiring Mateland to ascertain whether she intended to return to work. Monte testified that he "didn't think she wanted to be in the same office with [him] anymore" because of the incident on June 18. By the same token, Knorowski never directly contacted Kenrich to inform it of her expected return date.

Kenrich apparently learned that Knorowski intended to resume work on November 1, 1987, when, on September 3, Lucania received certain insurance forms from Kenrich's insurance carrier which Knorowski and her psychiatrist, Dr. Jacoby, had filled out in connection with a long term disability claim she had filed.[4] The forms specified the nature of Knorowski's illness as an "adjustment disorder" caused by an "emotional injury" which occurred on June 18, 1987. Kenrich's physician, Dr. Williams, completed an additional insurance form on October 5, 1987, in which he indicated that Knorowski had an "overriding fear of returning to work" but that she should be capable of trial employment on November 1, 1987.

Knorowski appeared for work on November 2, 1987. Immediately after her arrival, she was summoned to a meeting with Salvatore Monte and Lucania, who informed her that she was being placed on indefinite layoff because Kenrich had already hired a replacement for her and no other clerical positions were available. When Knorowski objected that she had seniority over her replacement, Lucania responded that she "didn't give [Kenrich] any information that [she] would be coming back to work." Monte further advised her that she would be recalled if there were any clerical openings in the future. Knorowski's layoff status continued until July 7,

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[4] Lucania sent Knorowski the appropriate insurance forms on August 20, 1987. In his cover letter accompanying the forms, he made no reference to the length of Knorowski's disability or Kenrich's lack of certainty regarding her continued employment or her return date. App. at 596.

1988, when Kenrich recalled her and reinstated her to her former position.

3. *McPartlan's Discharge*

Prior to June 1987, Kenrich allowed its clerical employees to work part-time. Karen McPartlan began work with Kenrich in 1975 on a flex-time basis but left in 1980 to have children. In the summer of 1983, she resumed work on an "as needed basis" at Monte's request. This situation continued until May 1984 when she became a part-time employee with flexible hours and began receiving Kenrich benefits. In September 1986, Kenrich moved to eliminate part-time employment among the clerical staff. However, Kenrich did not require McPartlan to comply with its new policy at that time but, instead, eliminated her flex-time schedule, setting her hours at 9:00 a.m. to 3:00 p.m. This arrangement lasted until June 1, 1987, when Monte informed the clerical staff that all clerical employees were expected to work a full time schedule, from 8:30 a.m. to 5:00 p.m.[5] McPartlan did not mention her change in hours to Monte because she was able to adhere to her new schedule during the summer, while her children were attending summer camp.

On August 3, 1987, following its certification by the Board, the union notified Kenrich that McPartlan had

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[5] The Board decided the Kenrich's elimination of part-time employment among the clerical staff constituted an independent violation of sections 8(a)(1) and (3) of the Act. As Kenrich does not seek review of this finding, we assume it to be correct for purposes of our analysis of McPartlan's discharge.

been selected as its shop steward and would be a member of the union's negotiating committee. Several weeks later, McPartlan requested reinstatement of her part-time hours because her children were resuming school and she could no longer adhere to a full-time schedule. Monte told her that "with all this union stuff . . . going on . . . [he could not] make any kind of agreement with [her] outside of the collective bargaining agreement."

By letter dated September 11, McPartlan informed Kenrich that she intended to "resume [her] school year hours of 9:00 a.m. to 3:00 p.m. effective September 14, 1987." Kenrich immediately notified McPartlan in writing that she was expected to work a full-time schedule. On September 15 and 16, McPartlan arrived for work at 9:00 a.m. and each day received warning letters in which Kenrich threatened disciplinary action, including discharge, if she continued to adhere to a part-time schedule. Kenrich discharged McPartlan on September 17 when she again followed her part-time schedule. McPartlan's termination letter stated that she had been discharged for her "flagrant disregard of company rules."

## DISCUSSION

*Discharge of Supervisor Helen Chizmar*

Kenrich maintains that ALJ erred in finding that Kenrich's discharge of Helen Chizmar violated section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), because the judge improperly applied an outmoded subjective test when analyzing the claim. Kenrich does not dispute that a supervisor's discharge may serve as the predicate for an 8(a)(1) violation where the discharge "interfere[s] with,

restrain[s], or coerce[s] employees in the exercise of" their right to engage in protected concerted activity. Indeed, Kenrich could not plausibly so argue, as it is settled law that, notwithstanding the statutory exclusion of supervisors from the Act's protection, *see* 29 U.S.C. § 152(3) & (11), that an employer's discharge of a supervisor may give rise to an 8(a)(1) violation. *See, e.g., Delling v. NLRB*, 869 F.2d 1397 (10th Cir. 1989) (discharge of supervisor for refusal to falsify termination slips of unlawfully discharged employees); *NLRB v. Advertisers Mfg. Co.*, 823 F.2d 1086 (7th Cir. 1987) (discharge of supervisor in retaliation for her son's union activities); *Oakes Machine Corp., A Subsidiary of Kathy Industries, Inc.*, 288 NLRB No. 52 (1988) (discharge of supervisor because of his stated intention to testify on employee's behalf). *See also Florida Power and Light Co. v. Int'l Brotherhood of Electrical Workers*, 417 U.S. 790, 808 n. 18, 94 S.Ct. 2737, 2746 n. 18, 41 L.Ed.2d 477 (1974). Instead, Kenrich argues that the only relevant inquiry in a case involving a supervisor's discharge is whether the circumstances underlying the discharge were objectively reasonable, regardless of the employer's motivation or the effect of the discharge on the employees' protected activity.

Kenrich relies on *Parker-Robb Chevrolet, Inc.*, 262 NLRB 402 (1982), *enforced sub nom., Automobile Salesmen's Union v. NLRB*, 229 U.S.App.D.C. 105, 711 F.2d 383 (1983), wherein the Board overruled its longstanding and widely criticized precedent that a discharge of a supervisor violated section 8(a)(1) if it is an "integral part" of a plan or is part of a "pattern of conduct" intended to intimidate employees in the exercise of their Section 7 rights. *Id.* (citing *DRW Corporation d/b/a/ Brothers Three Cabinets*, 248

NLRB 828 (1980)).[6] In overruling the "pattern of conduct" cases, the Board reasoned that they unduly extended the Act's protection to situations where the supervisor's discharge had only an incidental effect on employees' section 7 rights. 262 NLRB at 403. Thus, rather than vindicating employees' rights, the cases had the primary effect of imposing liability on employers for discharges of supervisory personnel which were clearly lawful under the Taft-Hartley amendments. *Id.* The Board also stated, in language especially pertinent to this appeal, that the subjective standard it had applied when assessing the legality of the supervisor's discharge was "clearly unworkable" because the "employer's subjective hope or expectation" that the discharge might discourage union activity could not "change the character of its otherwise lawful conduct." *Id.* at 404 & n. 15.

Kenrich focuses on the above language in arguing that, since *Parker-Robb*, supervisor discharges have been governed by an objective standard. Applying this standard, Kenrich maintains that its discharge of Chizmar was lawful because no reasonable employer would tolerate a situation where a supervisor directly managed a

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[6] In its "pattern of conduct" cases, the Board had found that a discharge of a supervisor who engaged in or otherwise assisted union activities could serve as a predicate for an independent 8(a)(1) violation if the discharge was contemporaneous with an unlawful discharge of a rank and file employee. The existence of a violation turned on the employer's motivation in discharging the supervisor: "there [was] no violation if the supervisory discharge [was] motivated by disloyalty, but a supervisor's discharge [was] found to be unlawful if it [was] motivated by a desire to thwart organizational activity among employees." *Parker-Robb*, 262 NLRB at 404.

bargaining unit composed of her close relatives. Indeed, as Kenrich points out, the ALJ himself acknowledged that, viewed objectively, the organizational activities of Chizmar's relatives did create an irreconciliable conflict of interest which necessitated Chizmar's discharge. According to Kenrich, this observation should have ended the ALJ's analysis: once Kenrich identified a legitimate objective basis for the discharge, the ALJ's further inquiry into its actual motivation in discharging Chizmar was barred by *Parker-Robb*.

Insofar as Kenrich's defense raises a question of law, our review is plenary, although the Board's legal analysis is "entitled to respect if based upon a reasonably defensible construction of the Act." *NLRB v. Local 54, Hotel Employees & Restaurant Employees Int'l Union, AFL-CIO*, 887 F.2d 28, 29 (3d Cir.1989); *NLRB v. Louton, Inc.*, 822 F.2d 412, 414 (3d Cir. 1987). *See also NLRB v. United Food & Commercial Workers' Union Local 23, AFL-CIO*, 484 U.S. 112, 123, 108 S.Ct. 413, 421, 98 L.Ed.2d 429 (1987) (where the statute is " 'silent or ambiguous,' " the Board's statutory interpretation should be sustained if it is "rational and consistent.") (citation omitted).

The issues, as framed by Kenrich, bring into sharp relief a difficult and recurring problem in the federal labor law, namely the extent to which the Board, in seeking to vindicate the statutory rights of rank and file employees, may limit an employer's otherwise unfettered right to discharge a supervisor. On the one hand, the Labor Management Relations Act of 1947, (Taft-Hartley), 29 U.S.C. § 141 *et seq.*, excluded supervisors from the statutory definition of protected employees in order to preserve the employer's right to the undivided loyalties

of its supervisory personnel. In *Beasley v. Food Fair of North Carolina*, 416 U.S. 653, 661-62, 94 S.Ct. 2023, 2028, 40 L.Ed.2d 443 (1974), the Supreme Court stated that the history of the Taft-Hartley amendments:

> compels the conclusion that Congress' dominant purpose in amending §§ 2(3) and 2(11), and enacting § 14(a) was to redress a perceived imbalance in labor-management relationships that was found to arise from putting supervisors in the position of serving two masters with opposed interests.

An employer may relinquish its right to demand undivided loyalty from supervisors by employing unionized supervisors. *Florida Power and Light*, 417 U.S. at 812-13, 94 S.Ct. at 2748-49. However, the employer does not commit an unfair labor practice if it discharges or otherwise discriminates against supervisors because of their concerted activities. *Id. See also Hi-Craft Clothing Co. v. NLRB*, 660 F.2d 910, 918 (3d Cir.1981).

On the other hand, the Board has long recognized, with court approval, that the Taft-Hartley amendments do not license an employer to compel a supervisor, on pain of discharge, to serve as a conduit for unfair labor practices or take other action which "directly interferes" with employees' statutory rights. *Automobile Salesmen's Union, Local 1095 v. NLRB*, 711 F.2d at 386-87. In seeking to preserve employees' Section 7 rights, the Board has attempted to "draw the proper line between protecting the employer's right to demand loyalty from his supervisors and protecting the employee's right to be free from unfair labor practices funnelled through a supervisor by the employer." *Id.* at 386. *See generally* Comment, *Union*

*Busters and Front-Line Supervisors: Restricting and Regulating the Use of Supervisory Employees by Management Consultants during Union Representation Election Campaign*, 135 U.Pa.L.Rev. 453, 470-74 (1987).

As the Board's experience in the "pattern of conduct" cases demonstrates, that line is not easily drawn. However, we are not persuaded by Kenrich's argument that the Board categorically rejected its subjective test when it overruled those cases in *Parker-Robb*. According to our understanding of the Board's approach to supervisor discharges, the objective standard set forth in *Parker-Robb* is confined to cases where the supervisor's discharge incidentally affects employees' exercise of Section 7 rights.[7] In *Parker-Robb*, the Board identified three classes of cases where such discharges directly interfere with protected concerted activity: where the supervisor is terminated for testifying on behalf of a protected employee, for refusing to commit an unfair labor practice, or for failing to prevent unionization. As explained below, we believe that the Board continues to apply a subjective standard in cases falling within recognized exceptions to the *Parker-Robb* rule.

Our result in this case is informed by *Advertisers Manufacturing Co.*, 280 NLRB 1185 (1986), *enforced*, 823

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[7] The Board's language in *Parker-Robb* might also support an application of the objective standard to all cases where the supervisor herself engaged in concerted activity, regardless of whether the supervisor's discharge had a direct or indirect effect on employees' statutory rights. The question whether *Parker-Robb* governs such cases is not before us, as it is undisputed that Helen Chizmar did not become involved in her relatives' organizational activities.

F.2d 1086 (7th Cir.1987), wherein the Board grafted an additional exception to the *Parker-Robb* rule for cases in which a supervisor is discharged in retaliation against the protected concerted activities of her close relatives. *Id.* at 1186 (reaffirming *Consolidated Foods Corp.*, 165 NLRB 953 (1967) and *Golub Brothers Concessions*, 140 NLRB 120 (1962)).[8] The Board distinguished retaliatory discharges from the "pattern of conduct" cases it overruled in *Parker-Robb* on the ground that supervisors in the former class of cases "had not engaged in any union activity." 280 NLRB at 1186. In addition, in analogizing retaliatory discharge cases to the exceptions enumerated in *Parker-Robb*, the Board indicated that retaliatory discharges of relative-supervisors have as deleterious an effect on employees' protected activities as do discharges of supervisors for their refusal to commit unfair labor practices. *Id.* at 1185-86.

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[8] The supervisor in *Advertising Manufacturing Co.*, was terminated two days after her son was elected chief shop steward. The employer alleged that numerous deficiencies in the supervisor's job performance justified her discharge. The ALJ, however, discounted the employer's evidence as pretextual. In support of his finding of a retaliatory discharge, the ALJ pointed to "the timing of the discharge [and] the lack of any legitimate reason or justification therefor." 280 NLRB at 1203. The ALJ also recited that "coincidental acts of retaliation against" protected employees proved that the supervisor's discharge formed part of a "pattern of conduct" aimed at unlawfully interfering with the employees' Section 7 rights. *Id.* As the Board noted in its affirmance, the ALJ's decision was unenforceable insofar as it purported to rely on "pattern of conduct" cases overruled in *Parker-Robb*. *Id.* at 1185.

The Court of Appeals for the Seventh Circuit agreed, stating that "[t]o retaliate against a man by hurting a member of his family is an ancient method of revenge, and is not unknown in the field of labor relations." 823 F.2d at 1088. Having accepted the Board's determination that retaliatory discharges warranted an additional exception to the *Parker-Robb* rule, the court affirmed because the record supported the Board's finding that the employer's explanation for the discharge was pretextual. In doing so, the court implied that inquiries into the employer's motivation for the discharge are permissible in cases falling within a *Parker-Robb* exception.[9]

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[9] Kenrich maintains that *Advertisers Mfg.* "demonstrates the proper application of the objective standard adopted in *Parker-Robb*." Brief at 23. As Kenrich observes, the employer in *Advertisers* did not claim that the discharge was necessitated by the supervisor's conflict of loyalties; instead, it pointed only to alleged deficiencies in the supervisor's job performance, evidence which was discounted by the ALJ as an outright fabrication. Once the employer's purported reasons for the discharge were discredited, the sole remaining explanation for the discharge was the employer's unlawful endeavor to intimidate union supporters. *Advertisers*, 823 F.2d at 1088. Thus, Kenrich argues, the employer failed to establish a legitimate objective basis for the discharge as required by *Parker-Robb* and was properly held liable for its violation of section 8(a)(1).

We are unpersuaded by Kenrich's argument, as it relies on a strained reading of the Court of Appeals' language in *Advertisers*. The fact that the employer's evidence was deemed insufficient to substantiate its claimed justification for the discharge does not mean that the court applied an objective test when analyzing the discharge. Moreover, the court expressly stated that it was not relying on *Parker-Robb*: "The company argues that *Parker-Robb* should control the present case. It reads too much into *Parker-Robb*." *Id.*

This analysis was consistent with other post-*Parker-Robb* decisions involving 8(a)(1) violations predicated upon the employer's discharge of supervisory personnel. In *Oakes Machine Corporation, A Subsidiary of Katy Industries, Inc.*, 288 NLRB No. 52, a supervisor was discharged because of his stated intention to testify on behalf of a discharged employee who had independently contacted county health officials to complain about allegedly unsafe levels of radioactivity in his work area. Although the Board decided that the *employee* had no recourse under section 8(a)(1) because he had not acted in concert with other employees when he contacted the health officials, the Board found that the *supervisor's* discharge violated 8(a)(1) because it was motivated in part, by a clearly unlawful objective. The Board reached this conclusion, notwithstanding the fact that the ALJ had credited the employer's testimony that a "concurrent" reason for the discharge was the supervisor's inability to control employees under his supervision. The Board stated:

> [g]iven the fact that the [employer's] action was motivated in part by a reason which we find unlawful under the foregoing exception to the *Parker-Robb Chevrolet* rule, it was incumbent on the [employer] to establish by a preponderance of the evidence that it would have fired [the supervisor] even if he had not threatened to testify on [the employee's] behalf . . . We think that [the employer] failed to meet that burden. . . . [B]oth lawful and unlawful grounds motivated the [employer]. Although the judge found that the lawful reason was 'primary,' still in light of *Wright Line* the [employer] could not prevail without an additional showing that that reason alone would have prompted [the supervisor's] discharge. [citations omitted.]

*See also Keith Austin, Inc.*, 288 NLRB No. 72 (1988) (finding no violation of section 8(a)(1) because credible evidence supported employer's claim that its sole motivation for discharging the supervisor was her incompetence).

The Board's analysis of cases involving discharges of supervisory personnel can be summarized as follows. As a general rule, a supervisor's discharge cannot serve as a predicate for an unfair labor practice because supervisors are unprotected by the Act. Accordingly, in most cases, the Board will not consider the employer's subjective intent in discharging the supervisor because, given the Act's exclusion of supervisors from the class of protected persons, the employer's motivations are irrelevant. *See, e.g., Pontiac Osteopathic Hospital*, 284 NLRB No. 51 (1987) (holding that employer has a right to discharge supervisor for expressing her disapproval of unlawful discharge of statutory employee where employer did not coerce supervisor into participating in any of its unfair labor practices); *Crouse-Hinds Co., a Division of Cooper Industries*, 273 NLRB 333 (1984) (holding that employer could freely discharge supervisor because of conflict of loyalties created by his business partnership with known union organizer).[10]

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[10] Kenrich suggests that the instant case is analogous to *Crouse-Hinds* because both involved irreconcilable conflicts of loyalty which compelled the supervisor's termination. Brief at 26. *Crouse-Hinds* is inapposite, however, because the basis for the decision was the ALJ's determination, affirmed by the Board, that a supervisor's termination for his refusal to sever a business relationship with a protected employee is not so inherently destructive of the employee's rights as to warrant

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Cases falling within recognized exceptions to the *Parker-Robb* rule are analyzed in the same manner as any discharges alleged to violate section 8(a)(1). The General Counsel bears the burden of persuasion that "an antiunion animus contributed to the employer's decision to discharge [the] employee." *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 395, 103 S.Ct. 2469, 2471, 76 L.Ed.2d 667 (1983) (approving *Wright Line, A Division of Wright Line, Inc.*, 251 N.L.R.B. 1083, 105 L.R.R.M. 1169 (1980), *enf'd*, 662 F.2d 899 (1st Cir.1981), *cert. denied*, 455 U.S. 989, 102 S.Ct. 1612, 71 L.Ed.2d 848 (1982)). Once a prima facie case is established, the burden shifts to the employer to prove by a preponderance of the evidence that it would have discharged the employee even absent its unlawful motivation. *Transportation Management*, 462 U.S. at 400, 103 S.Ct. at 2473. In meeting its burden of proof, the employer need not rebut the General Counsel's evidence of antiunion animus; the employer's burden is more in the nature of an "affirmative defense." *Id.*

This being the standard, the Board did not err when it adopted the ALJ's decision. Kenrich's antiunion animus at the time of Chizmar's discharge was amply demonstrated by Monte's admission that he felt "betrayed"

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an exception to the *Parker-Robb* rule. 273 NLRB at 337. The ALJ distinguished the case from cases involving terminations of supervisor's spouses reasoning that in the latter situation, the protected employee is threatened not only with loss of his spouse's income, but is placed in a position where his union activities may jeopardize his marriage. *Id.* at 339 ("something more than an economic relationship is part of the underlying rationale in the supervisor spouse case," namely, "the husband-wife relationship").

when he learned of the employees' decision to unionize, by Bernicker's comment that Monte discharged Chizmar because he "was not going to put up with any union bullshit," and by Monte's later statement to Union negotiators that he intended "to get rid of the whole [Chizmar] family."

Under *Wright Line*, General Counsel's establishment of its prima facie case caused the burden to shift to Kenrich to prove, by a preponderance of the evidence, that Helen Chizmar was discharged because of the irreconcilable conflict of loyalties she would experience if her relatives unionized. While it is probable that a reasonable employer would have discharged Chizmar under such circumstances, Kenrich failed to prove that Chizmar's anticipated conflict of loyalties in fact contributed to its discharge decision. Unlike the employer in *Crouse-Hinds*, which had openly objected to a supervisor's business partnership with a known union organizer, Kenrich officials kept to themselves any misgivings they had over Chizmar's ability to supervise her relatives. Monte made no reference to Chizmar's alleged conflict when he discharged her or when he later attempted to rationalize his decision to Catherine Chizmar. Indeed, it appears that Monte's apprehension about Chizmar's loyalty to Kenrich first surfaced at the hearing before the ALJ. Although, as Kenrich suggests, it might have been futile to raise the issue with Chizmar herself, as she hardly could dissolve the family relationships which gave rise to the alleged conflict, Kenrich could not prevail without adducing some credible evidence that it acted from proper motives.

Moreover, the timing of Helen Chizmar's discharge is highly suspect. Chizmar was terminated on May 29, 1987, practically three weeks before Kenrich's offer voluntarily to recognize the union. Thus, at the time of the discharge, Kenrich officials apparently believed that they still might defeat the union. In fact, the meeting wherein Monte attempted to dissuade McNally, Bobb, and Catherine Chizmar from joining the union occurred on June 3, 1987, just a few days after Helen Chizmar's termination. Although Kenrich probably is correct in its assertion that it did not have to wait until Chizmar actually compromised her duty of loyalty to Kenrich, the fact that the termination occurred at such an early stage of the union campaign casts considerable doubt on Kenrich's defense.

Contrary to Kenrich's suggestion, the ALJ's application of the *Wright Line* "mixed motive" test did not lead inexorably to his finding of an unfair labor practice. If Kenrich had substantiated its claim that Chizmar's conflict of loyalties contributed to the discharge decision then, under *Wright Line*, Kenrich would have prevailed. Absent such proof, the Board and the ALJ certainly were justified in finding that Kenrich's belated explanation for the discharge was pretextual and Kenrich's sole intent was to retaliate against Chizmar's relatives for attempting to unionize. Accordingly, we agree with the Board's finding of an 8(a)(1) violation.

*Remedy Regarding Helen Chizmar*

We do not reach a similar conclusion with respect to the Board's selection of remedy because we fail to see how Chizmar's reinstatement with backpay serves any

legitimate remedial purpose. Instead, we conclude that the Board exceeded its remedial authority and stepped beyond the permissible boundaries of the Taft-Hartley Act in seeking to recompense a supervisor for Kenrich's unlawful attempt to thwart the union's organizational campaign.

The Board's remedial powers derive from section 10(c) of the Act, 29 U.S.C. § 160(c), which empowers the Board to "take[e] such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the Act]." Although the Board has "wide discretion" in fashioning remedies for unfair labor practices, *Virginia Electric and Power Co. v. NLRB*, 319 U.S. 533, 539, 63 S.Ct. 1214, 1218, 87 L.Ed. 1568 (1943), and the Board's selection of remedy is entitled to considerable judicial deference, *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 612 n. 32, 89 S.Ct. 1918, 1939 n. 32, 23 L.Ed.2d 547 (1969), appellate courts need not rubber-stamp a remedial order which is "a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." *NLRB v. R.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 263, 90 S.Ct. 417, 420, 24 L.Ed.2d 405 (1969).

In reviewing the propriety of the Board's order, we are not constrained by our own precedent as we have not conclusively answered the question of whether the Board has the power to order a supervisor's reinstatement. In *Hi-Craft Clothing Co. v. NLRB*, 660 F.2d at 910, we denied enforcement of a Board order compelling the reinstatement of a supervisor who was dismissed when he threatened to institute a Board action against his employer based on a personal grievance. In that case, however, the interests of rank and file employees were not ever at

stake and thus the opinion is not conclusive here. Nevertheless *Hi-Craft* is significant as we viewed the question of whether a supervisory employee could be reinstated as "a case of straightforward statutory construction." *Id.* Of course, in view of the Taft-Hartley Act we had no difficulty in concluding that the supervisor could not be ordered reinstated. *Id.* at 918.

We acknowledge, however, that other courts of appeals have enforced reinstatement orders on the theory that reinstatement of an unlawfully discharged supervisor tends to "dissipate the effects of an unfair labor practice and restore the status quo." *NLRB v. Talladega Cotton Factory, Inc.*, 213 F.2d 209, 217 (5th Cir.1954). *See also Delling v. NLRB*, 869 F.2d at 1397; *NLRB v. Advertisers Mfg. Co.*, 823 F.2d at 1086; *Howard Johnson Co. v. NLRB*, 702 F.2d 1, 6 (1st Cir.1983); *Belcher Towing Co. v. NLRB*, 614 F.2d 88, 91-92 (5th Cir.1980); *Russell Stover Candies, Inc. v. NLRB*, 551 F.2d 204, 206-07, (8th Cir.1977). However, we shall not attempt to harmonize our decision with the above cases because they involved fact patterns which are substantially different from the situation here.

As in all cases, the remedy selected by the Board must "effectuate the policies of [the Act]," 29 U.S.C. § 160(c), that is, it must redress the type of harm the Act was meant to prevent. Although the Board, in exercising its remedial power, may do more than make employees whole for monetary losses suffered on account of an unfair labor practice, *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 193, 61 S.Ct. 845, 852, 85 L.Ed. 1271 (1940), the remedy chosen still must, in some way, "safeguard[ ] and encourage[ ] the right of self-organization." *Id.* In this case, because Helen Chizmar was fired in retaliation for

the organizing activities of her relatives, we believe that the propriety of the Board's reinstatement order must be tested in the context of an organizational campaign. As Kenrich puts it, the remedy was permissible only if it was needed "to restore the employees' organizational rights." Letter Brief at 12.

Viewed in this light, it is difficult to see how Chizmar's reinstatement with back pay could serve any legitimate remedial purpose. Chizmar was terminated on May 29, 1987, and, on June 16, the Company offered to recognize the bargaining unit. After the employees rejected that offer, an election was held on July 2 in which the union prevailed. Following the union's certification on August 11, Kenrich and the union began negotiating a collective bargaining agreement. Thus, any coercive effect Chizmar's discharge may have had on the employee's organizational efforts is not apparent from the record. Indeed, it would defy common sense to hold that it is necessary to reinstate Helen Chizmar to correct the effect of the unfair labor practice. Her reinstatement would be meaningless in that respect but would frustrate the policy of the Act with respect to supervisory employees.

While we appreciate the narrow scope of our review of the Board's remedial orders, *Louton*, 822 F.2d at 414, we would be abdicating our responsibility if we approved the Board's remedy in this case. Chizmar's discharge simply did not undermine the union's support as it prevailed in the election and even if it had not the Board could have remedied the situation by ordering a new election or by issuing a bargaining order. *NLRB v. Gissel*

*Packing Co.*, 395 U.S. at 612-15, 89 S.Ct. at 1939-40.[11] Instead, in ordering Chizmar's reinstatement, the Board selected a remedy which conferred benefits flowing exclusively to a supervisor and as such, exceeded its remedial power. *See Hi-Craft Clothing*, 660 F.2d at 918 ("When only the supervisor's interests are at stake, . . . the intent of the Taft-Hartley Amendments is to deny jurisdiction to the Board.").

We express no opinion as to whether in some future case, the Board might be justified in ordering a supervisor's reinstatement with back pay. Where a supervisor is dismissed for refusing to commit an unfair labor practice, it may very well be that the supervisor's reinstatement is the only means by which the Board can adequately safeguard employees' rights. *See, e.g., Delling*, 869 F.2d at 1399-1400 (refusal to falsify termination slips in furtherance of employer's attempt to establish a pretext for unlawful discharges of statutory employees); *Howard Johnson Co. v. NLRB*, 702 F.2d at 6 (refusal to engage in unlawful surveillance of union activity). However, in view of the Taft-Hartley amendments, we are compelled to scrutinize closely an order of reinstatement of a supervisor lest we frustrate the intention of Congress.

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[11] The Supreme Court explained in *Gissel* that a bargaining order is appropriate where the employer, through pervasive unfair labor practices, has so "undermine[d] a union's strength" that "the only fair way to effectuate employee rights is to reestablish . . . conditions as they existed before the employer's unlawful campaign." *Id.* 395 U.S. at 612, 89 S.Ct. at 1939.

Our unwillingness to enforce the Board's order in this respect should not be construed to mean that we tacitly approve of Kenrich's conduct or that we lack sympathy for Helen Chizmar's plight. But where, as here, an order does not serve any legitimate remedial purpose under the Act, we are constrained to regard it as an unauthorized attempt to impose punitive sanctions on the employer. *See Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10-11, 61 S.Ct. 77, 79, 85 L.Ed. 6 (1940). *See generally Deboles v. Trans World Airlines, Inc.*, 552 F.2d 1005, 1019 (3d Cir.), *cert. denied*, 434 U.S. 837, 98 S.Ct. 126, 54 L.Ed.2d 98 (1977) (" 'it is the general policy of the federal labor laws . . . to supply remedies rather than punishments' ") (citations omitted). Accordingly, we deny enforcement of that portion of the Board's order compelling Helen Chizmar's reinstatement with back pay.

*Assault of Barbara Knorowski*

The Board accepted the ALJ's determination that Kenrich violated section 8(a)(1) of the Act when, on June 18, Monte intentionally assaulted Barbara Knorowski because of her union activities after she attempted to express her condolences for his father's death. On appeal, Kenrich insists that Monte rejected Knorowski's condolences for personal reasons unrelated to the union campaign and that any physical contact between Monte and Knorowski was inadvertent. Kenrich points out that Monte made no reference to Knorowski's union activities during the "alleged" assault; he mentioned the union only after the plant shop steward, McClean, arrived at the behest of Catherine Chizmar. Thus, Kenrich argues, the

confrontation between Monte and Knorowski cannot possibly be construed as an unfair labor practice and the ALJ's finding that Monte's conduct violated section 8(a)(1) should be set aside as unsupported by substantial evidence. Brief at 33.

If we were free to engage in a *de novo* review of the record, we might well agree with Kenrich because we could reasonably infer that Monte's extreme reaction to Knorowski's expression of condolences was caused by his bereavement over his father's death rather than his antiunion animus. However, as a reviewing court, we must sustain the Board's factual inferences if they are supported by substantial evidence even though, acting *de novo*, we might have reached a different conclusion. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S.Ct. 456, 465, 95 L.Ed. 456 (1951); *Hunter Douglas, Inc. v. NLRB*, 804 F.2d 808, 812 (3d Cir.1986), *cert. denied*, 481 U.S. 1069, 107 S.Ct. 2461, 95 L.Ed.2d 870 (1987).

Here, the ALJ found it "highly relevant" that Monte himself admitted that he rejected Knorowski's condolences because he was angered by her attempt to persuade Linda Ferrino to join the union. App. at 707. Although no reference was made to the union during the assault, Monte's admission provided a sound basis for the ALJ's inference that the assault was motivated by antiunion animus. As Monte is Kenrich's President, his antiunion animus certainly can be imputed to Kenrich, especially in view of the fact that no Kenrich official made any attempt to repudiate his conduct. *See Graves Trucking, Inc. v. NLRB*, 692 F.2d 470, 473-74 (7th Cir. 1982). Furthermore, the physical contact between Monte and Knorowski cannot fairly be described as inadvertent as

the parties stipulated that the hallway was so narrow that two individuals could not pass through it without one stepping aside. In such circumstances, the ALJ was justified in concluding that "[t]he only reasonably foreseeable result of Monte's actions [was] that Knorowski would be propelled into the filing cabinets." App. at 707-08.

Thus, while, Monte's derogatory comments about the union *after* the incident could not, in themselves, transform a personal encounter with Knorowski into an unfair labor practice, his testimony that the incident was attributable to Knorowski's concerted activity and the purposeful nature of his physical contact with Knorowski, provide substantial evidence in support of the Board's finding of an 8(a)(1) violation.

*Causing Catherine Chizmar and Barbara Knorowski to be Absent from Work and Laying Off Knorowski*

The ALJ found that Kenrich committed two independent unfair labor practices under sections 8(a)(1) and (3) when Kenrich, through Monte's abusive conduct on June 18, caused Catherine Chizmar and Knorowski to suffer debilitating "psychiatric injuries," and when it placed Knorowski on indefinite layoff following her disability leave for psychiatric treatment. Kenrich asserts that the Board erred in adopting the ALJ's causation finding with respect to the first unfair labor practice because the ALJ impermissibly speculated as to the source of the employees' emotional disturbances in the absence of competent medical evidence. Brief at 38-39. Kenrich also complains that the ALJ's denial of its request for prehearing discovery precluded it from adequately preparing its defense. *Id.* at 40.

We reject both the above contentions and deny review of the Board's decision that Kenrich unlawfully caused Catherine Chizmar's and Knorowski's illnesses. We also summarily deny review of the Board's decision with respect to Knorowski's layoff, as Kenrich appears to concede that if it unlawfully caused Knorowski's absence from work, then its refusal to offer her immediate reinstatement also was unlawful. *Id.* at 42.[12]

According to Kenrich, the injuries suffered by Catherine Chizmar and Knorowski presented "complex medical issues of causation" which could not be resolved without expert medical testimony. Kenrich relies on *Bushman v. Halm*, 798 F.2d 651, 659 (3d Cir. 1981), wherein we opined that an expert opinion is required to prove medical causation "[i]f the question . . . is so esoteric that lay minds cannot form any intelligent judgment about it

[12] Even absent Kenrich's concession, we would deny review because Kenrich raises only factual issues with regard to Knorowski's layoff, and we believe that the Board's decision on this issue was supported by substantial evidence. *Universal Camera*, 340 U.S. at 488, 71 S.Ct. at 465. Kenrich alleges that it failed to reinstate Knorowski not because of antiunion animus but because she had failed to apprise Kenrich of her expected return date and no clerical positions were available when she appeared for work on November 2, 1987. Although Knorowski was somewhat lax in informing Kenrich about her plans and therefore, under normal circumstances, Kenrich could not be faulted for failing to preserve a position for her, the circumstances of Knorowski's disability were not normal. The Board was certainly justified in accepting the ALJ's conclusion that the onus was on Kenrich to accommodate Knorowski, given that it unlawfully caused her absence from work.

without expert aid."[13] We noted, however, that in other cases, "circumstantial evidence or common knowledge may provide a sound basis from which a causal sequence may be inferred." *Id.* The need for an expert opinion thus hinges on the factfinder's "ability to make a rational inference that accident and injury are related." *Id.* at 658.

It is true that medical judgments lie beyond the scope of the Board's expertise and therefore, under the substantial evidence test, they should be set aside if the Board's medical conclusions were based on sheer speculation. *Universal Camera*, 340 U.S. at 488-90, 71 S.Ct. at 464-66; *Sioux Quality Packers, Div. of Armour & Co. v. NLRB*, 581 F.2d 153, 157 (8th Cir.1978). However, in this cause, the Board, in adopting the ALJ's finding of causation, did not speculate, as that finding was based largely on medical reports prepared by the employees' physicians, on insurance forms completed by Knorowski's psychiatrist, and on the "disability certificates" issued by Kenrich's own physician, Dr. Williams.

Although there was no direct medical evidence that Monte's conduct caused the maladies, the ALJ rationally inferred that Monte was responsible since all of the examining physicians, including Dr. Williams, agreed that the illnesses began on the same day as his barrage of verbal abuse. Kenrich's sole complaint seems to be that the ALJ

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[13] The ALJ questioned Kenrich's reliance on *Bushman* because in that case we were primarily concerned with New Jersey tort law. However, as *Bushman* did contain an extensive discussion of evidentiary principles which would apply in any case involving issues of medical causation, Kenrich's reliance was not misplaced.

made his findings without hearing any live expert testimony. Because we are aware of no cases remotely suggesting that written reports are an insufficient basis for medical findings in any agency adjudication, the ALJ's resolution of the causation question must stand, as it was a rational inference from competent medical evidence and as such was based on substantial evidence. *Universal Camera*, 340 U.S. at 488-90, 71 S.Ct. at 464-66; *Sioux Quality Packers, Div. of Armour & Co. v. NLRB*, 581 F.2d at 157.

Kenrich's second complaint, regarding the ALJ's denial of its discovery request, requires little discussion. In its request, Kenrich sought access to any medical reports prepared by experts retained by General Counsel, and the opportunity to depose any witnesses, including the employees, who General Counsel intended to call at the hearing. App. at 33-34. The ALJ denied Kenrich's request on the ground that the Board's procedural rules normally do not permit prehearing discovery, except for good cause. App. at 38.[14] As the ALJ explained, the good cause exception is limited to instances where discovery is needed "for the preservation of evidence, usually because the witnesses will not be available to testify at the hearing." *Id.*

Here, Kenrich did not meet the good cause exception as it did not specify in its motion any ground relating to the preservation of evidence. But even if the ALJ did abuse his discretion, the error was at most harmless, as

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[14] The Board rules provide that "witnesses shall be examined orally under oath, except that for good cause shown after the issuance of a complaint, testimony may be taken by deposition." 29 C.F.R. § 102.30.

General Counsel did not call any expert witnesses and Kenrich already had been provided with the employees' medical reports. Also, Kenrich had an opportunity to cross-examine the employees as to the extent and cause of their injuries. Finally, we note that neither the constitution nor the Administrative Procedure Act confer a right to discovery in federal administrative proceedings. *See NLRB v. Valley Mold Co.*, 530 F.2d 693, 695 (6th Cir.), *cert. denied*, 429 U.S. 824, 97 S.Ct. 77, 50 L.Ed.2d 86 (1976) (no due process or APA requirement); *Frilette v. Kimberlin*, 508 F.2d 205, 208 (3d Cir.1974) (in banc), *cert. denied*, 421 U.S. 980, 95 S.Ct. 1983, 44 L.Ed.2d 472 (1975) (no requirement under the APA). Absent a showing of abuse of discretion or actual prejudice, Kenrich's procedural challenge must fail.

*McPartlan's Discharge*

The ALJ determined that Kenrich violated sections 8(a)(1) and (3) of the Act when it discharged Karen McPartlan for resuming her part-time hours in September, 1987, notwithstanding Monte's instruction that she continue working full-time. The ALJ's decision depended largely on his earlier finding that Kenrich's elimination of the clerical workers' part-time hours served as predicate for an independent unfair labor practice.[15] Although the

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[15] That finding has gone unchallenged in this appeal. Although Kenrich does not concede its guilt as to the change in work hours, it asserts that subsequent developments have rendered the issue moot. Brief at 6. Presumably, Kenrich refers to the fact that the collective bargaining agreement it negotiated with the union provides only for full-time employment. *Id.* at 48.

ALJ recognized that under "ordinary circumstances," McPartlan's disobedience would have justified her discharge, he reasoned that because the change in hours was itself unlawful, McPartlan's refusal to conform to her new schedule could not be considered insubordinate. App. at 716.

On appeal, Kenrich presses the same argument it did before the ALJ, namely that McPartlan's refusal to comply with Monte's instructions was insubordination in the form of self-help, and that her remedy lay with the Board. Brief at 47. In fact, as Kenrich points out, at the time of her discharge McPartlan already had filed a complaint with the Board protesting her change in hours. Given that McPartlan circumvented the Board's grievance procedures and unilaterally attempted to restore her part-time hours, Kenrich argues that her discharge cannot be considered violative of the Act.

Although this argument may have considerable force, we will not grant the petition for review or enforce the Board's order at this time but instead will remand the matter to the Board for reconsideration of both the lawfulness of McPartlan's discharge and the enforceability of its remedy that Kenrich restore her part-time hours, in view of the fact that the existing collective bargaining agreement does not provide for part-time employment. If the Board, upon reconsideration, again holds that McPartlan's discharge constituted an unfair labor practice and decides that the collective bargaining agreement does not preclude her part-time employment, it still will need to modify its remedy because it did not order McPartlan's reinstatement and, apparently, she no longer is employed

at Kenrich.[16] As our doubts regarding the unlawfulness of McPartlan's discharge arise from the Board's holdings in cases which were not addressed in the ALJ's opinion, we feel it is appropriate to leave it to the Board to decide whether its finding of an unfair labor practice is consistent with its own precedent. We explain below the nature of our reservations.

By its plain language, the NLRA does not preclude an employer for discharging a protected employee for just cause. *See* 29 U.S.C. § 160(c) ("No order . . . shall require the reinstatement of any individual . . . [who] was suspended or discharged for cause.") *See also Evans St. Clair,* 278 NLRB No. 65 (1986) (finding no 8(a)(3) violation where the employee was discharged for threatening supervisor during heated discussion over alleged unfair labor practices). Further, McPartlan's position as union shop steward did not immunize her from a lawful discharge. *See NLRB v. Appletree Chevrolet, Inc.,* 608 F.2d 988, 994 n. 5 (4th Cir.1979).

Even if the employees believe that their assigned tasks lie beyond the scope of their job responsibilities, the

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[16] In his recommended order, adopted by the Board, the ALJ stated that it was not necessary to order McPartlan's reinstatement because Kenrich already had reinstated her to her former position. According to Kenrich, however, on July 5, 1988, which was after the hearing before the ALJ but before he gave his decision, McPartlan resigned from Kenrich due to her inability to work a full-time schedule, as required by the collective bargaining agreement. It is difficult to see how this resignation could be attributed to an unfair labor practice as the full time schedule was the product of negotiation between Kenrich and the union.

Board normally has required them to satisfy their employer's demands and grieve later. As the Board wrote in *Audobon Health Care Center*, 268 NLRB No. 14 (1983), a case involving an unprotected "partial strike":

> [w]hile employees may protest and ultimately seek to change any term or condition of their employment by striking or engaging in a work stoppage, the strike or stoppage must be complete, that is, the employees must withhold all their services from their employer. They cannot pick and choose the work they will do or when they will do it. Such conduct constitutes an attempt by the employees to set their own terms and conditions of employment in defiance of their employer's authority to determine those matters and is unprotected.

268 NLRB at 137.

In view of the Board's strong condemnation of self-help in its "partial strike" precedent, we have doubts that McPartlan was privileged to disregard her change in hours. The language in *Audobon* seems to indicate that an employee engages in unprotected activity when she usurps her employer's prerogative to set the terms and conditions of employment, regardless of whether the employer's orders ultimately are found to be unlawful. If that is what the Board meant to hold in *Audobon*, then the unlawfulness of Kenrich's elimination of part-time hours might not have sanctified McPartlan's behavior at the time of the discharge.

We also question whether McPartlan engaged in "concerted activity" when she refused to comply with her full-time schedule. *See* 29 U.S.C. § 157. Although the

participation of two or more employees is not a prerequisite for satisfaction of the Act's concerted activity requirement, *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 831, 104 S.Ct. 1505, 1511, 79 L.Ed.2d 839 (1984),[17] the Act still requires "some nexus" between the employee's conduct and "group action." *Ewing v. NLRB*, 861 F.2d 353, 361 (2d Cir.1988). *See also Prill v. NLRB*, 835 F.2d 1481, 1484 (D.C. Cir.1987), *cert. denied*, ___ U.S. ___, 108 S.Ct. 2847, 101 L.Ed.2d 884 (1988) (upholding Board rule in *Meyers Industries, Inc.*, 281 NLRB No. 118 that an individual worker's invocation of statutory safety standards is not concerted unless the worker acts on the authority of his fellow workers). Here, there is no evidence that McPartlan enlisted the support of her co-workers before she took the actions which resulted in her discharge. Thus, it appears that McPartlan acted alone for her own benefit.

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[17] In *City Disposal Systems*, the Court held that an employee engages in concerted activity when, without enlisting the aid of his fellow workers, he refuses to obey an order which he reasonably believes is inconsistent with rights grounded in a collective bargaining agreement. The Court reasoned that an employees' invocation of rights derived from the collective bargaining process is inherently "concerted" because he "brings to bear on his employer the power and resolve of all his fellow employees." *Id.* 465 U.S. at 832, 104 S.Ct. at 1511.

McPartlan's conduct clearly was not within *City Disposal Systems* because her claimed right to work a part-time schedule derived from a separate agreement she allegedly reached with Kenrich before the unionization of the clerical staff. Thus, McPartlan's co-workers played no part in securing the right McPartlan sought to enforce.

In rejecting Kenrich's argument, the ALJ analogized McParlan's termination to a constructive discharge, reasoning that because McPartlan would have been protected had she resigned due to her inability to work a full-time schedule, her "decision to remain on the job . . . [did] not warrant a different result." App. at 717. While it is true that an employee who is constructively discharged as a result of an employer's unfair labor practices enjoys the same protection as an unlawfully discharged employee, there is a critical difference between this case and one involving a constructive discharge.

In the context of the Act, a constructive discharge occurs when an employee resigns in response to "intolerable conditions" created by the employer for the purpose of "discourag[ing] union activity or membership." *Cartwright Hardware Co. v. NLRB*, 600 F.2d 268, 270 (10th Cir.1979). *See also Bartman v. Allis-Chalmers Corp.*, 799 F.2d 311, 314 (7th Cir.1986), *cert. denied*, 479 U.S. 1092, 107 S.Ct. 1304, 94 L.Ed.2d 160 (1987). We underscore the requirement that an employee claiming constructive discharge in fact resign and thereby remove herself from her employer's authority. Although Kenrich may have created an "intolerable situation" when it unlawfully changed McPartlan's work schedule, McPartlan's response to the violation differed materially from that of a constructively discharged employee, as she attempted to continue her employment under terms which she unilaterally selected. In doing so, she engaged in disobedience which would not have occurred had she treated her change in work hours as a constructive discharge.

Although it may seem anomalous to hold that a constructively discharged employee has greater protection under the Act than one who continues her employment, the Board's refusal to condone partial strikes indicates that an employee cannot retain the benefits of employment while refusing to submit to its burdens, based on his or her personal judgment that the employer acted improperly when issuing a particular order. Accordingly, we feel that further consideration of Kenrich's liability is necessary in light of both *Audobon* and the Act's concerted activity requirement.

For the foregoing reasons, the petition for review will be granted in part and denied in part and the order of May 31, 1989, will be enforced in part and denied enforcement in part, and the Board's decision with regard to Karen McPartlan's discharge will be remanded for reconsideration of Kenrich's liability and the Board's selected remedy. The parties will bear their own costs in this court.

STAPLETON, Circuit Judge, concurring and dissenting:

I join all of the court's opinion other than the section entitled "Remedy Regarding Helen Chizmar." I respectfully dissent from the views there expressed.

The majority appears to hold that when an employer fires a supervisor for the purpose of coercing protected employees in the exercise of their rights under the Act, the Board is without power to order reinstatement and backpay of the supervisor absent a showing that the employees have failed to successfully exercise their rights in some specific manner. I believe this view does justice

neither to the myriad of circumstances in which such coercion can be applied nor to the many subtle ways in which such coercion can fail in its principal objective and nevertheless take a substantial toll on employee rights under the Act. The fact that the union's organizational efforts were successful here does not necessarily mean that the discharge did not intimidate the employees during the election or that they will not be intimidated by it in the future.

At the only other Court of Appeals to consider this precise issue has concluded, the Board is entitled to conclude that this kind of conduct in the overall context of a particular case poses such a substantial risk of suppressing the exercise of employee rights that the status quo must be restored. See *NLRB v. Advertisers Manufacturing Co.* 823 F.2d 1086 (7th Cir.1987) (reinstatement remedy upheld despite the success of the employees efforts to unionize).[1] I, too, am persuaded that there will be

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[1] I disagree also with the majority's implication that this case materially differs from the numerous decisions approving the reinstatement of supervisors who were fired for refusing to commit unfair labor practices and for testifying in Board proceedings. *See, e.g., Howard Johnson Co. v. NLRB,* 702 F.2d 1, 6 (1st Cir.1983) (reinstatement remedy upheld despite supervisor's refusal to commit unfair labor practice by informing on employees); *cf. Local No. 207, International Assoc. of Bridge Workers v. Perko,* 373 U.S. 701, 707, 83 S.Ct. 1429, 1432, 10 L.Ed.2d 646 (1963) (recognizing Board's authority to order reinstatement of supervisor discharged for refusing to engage in unfair labor practice). The employees in these decisions were not directly injured by the supervisor's dismissal precisely because the supervisor refused to further the employer's unlawful scheme. Rather, the courts have reasoned that these

(Continued on following page)

situations in which nothing less than the supervisor's reinstatement with backpay will protect the rights bestowed upon the employees by the Act. I would defer to the Board's judgment that this is such a case.

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(Continued from previous page)

employees would not likely fully exercise their rights in the future if employers could freely discharge supervisors who assisted in the defense of protected rights. Chizmar's reinstatement would protect the very same interest.

## APPENDIX E

Filed: March 20, 1990

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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Nos. 89-3392 & 89-3500

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KENRICH PETROCHEMICALS, INC.
*Petitioner/Cross-Respondent*

v.

NATIONAL LABOR RELATIONS BOARD,
*Respondent/Cross-Petitioner*

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On Petition For Review from the
National Labor Relations Board
(N.L.R.B. Nos. 22-CA-15105, 22-CA-15105 [sic]
and 22-CA-15258)

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Present: HIGGINBOTHAM, *Chief Judge*, and
SLOVITER, BECKER, STAPLETON, MANSMANN,
GREENBERG, HUTCHINSON, SCIRICA, COWEN,
NYGAARD and GARTH, *Circuit Judges*.

**ORDER SUR PETITION FOR REHEARING**

The NLRB has filed a petition for rehearing in banc "insofar as the panel majority declined to enforce the Board's order requiring Supervisor Helen Chizmar reinstated with back pay." A majority of the active judges of the court have voted for rehearing in banc as to Helen Chizmar. A rehearing in banc is hereby granted solely on the issue of whether the Board's order should be enforced as to Helen Chizmar. Solely as it pertains to Helen Chizmar, the panel's opinion is vacated and we stay the entry of any judgment.

BY THE COURT,

/s/ A. Leon Higginbotham, Jr.

Chief Judge

Dated: March 20, 1990

A True Copy:

Teste:

*Clerk of the United States Court of Appeals*
*for the Third Circuit*

## APPENDIX F

### STATUTES

The text of key sections of the National Labor Relations Act of 1935 (hereinafter "the Act") as amended by the Labor Management Relation Act of 1947 (hereinafter "Taft-Hartley"), and the original text of the Act, where relevant, are set forth below. Also set forth is one section of the Administrative Procedure Act.

### NATIONAL LABOR RELATIONS ACT

*Section 2(3)*

Section 2(3) of the Act, ch. 372, § 2, 49 Stat. 450 (1935), originally provided:

> (3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

Section 2(3), as amended by Taft-Hartley, ch. 120, Title I, § 101, 61 Stat. 137 (1947), codified at 29 U.S.C. § 152(3) (1988), now provides:

> (3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless [the Act] explicitly states otherwise, and shall

> include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, *or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.* (emphasis added to new language)

*Section 2(11)*

Section 2(11) of the Act, ch. 372, § 2, 49 Stat. 450 (1935), as amended by Taft-Hartley, ch. 120, Title I, § 101, 61 Stat. 137 (1947), codified at 29 U.S.C. § 152(11) (1988), provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

*Section 7*

Section 7 of the Act, ch. 372, § 7, 49 Stat. 452 (1935), as amended by Taft-Hartley, ch.120, Title I, § 101, 61 Stat. 140 (1947), codified at 29 U.S.C. 157 (1988), provides:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in [section 8(a)(3) of the Act].

*Section 8(a)(1)*

Section 8(a)(1) of the Act, ch. 372, § 8, 49 Stat. 452 (1935), codified as amended at 29 U.S.C. § 158(a)(1) (1988), provides:

> (a) It shall be an unfair labor practice for an employer –
>
> > (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

*Section 8(a)(3)*

Section 8(a)(3) of the Act, ch. 372, § 8, 49 Stat. 452 (1935), codified as amended at 29 U.S.C. § 158(a)(3) (1988), in pertinent part provides:

> (a) It shall be an unfair labor practice for an employer –
>
> > (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization. . . .

*Section 8(a)(5)*

Section 8(a)(5) of the Act, ch. 372, § 8, 49 Stat. 452 (1935), codified as amended at 29 U.S.C. § 158(a)(5) (1988), in pertinent part provides:

> (a) It shall be an unfair labor practice for an employer –
>
> > (5) to refuse to bargain collectively with the representatives of his employees. . . .

*Section 10(c)*

Section 10(c) of the Act, ch. 372, § 10, 49 Stat. 453 (1935), as amended by Taft-Hartley, ch. 120, Title I, § 101, 61 Stat. 146 (1947), and codified as further amended at 29 U.S.C. § 160(c) (1988), in pertinent part provides:

> (c) The testimony taken by such member, agent, or agency or the Board shall be reduced to writing and filed with the Board. Thereafter, in its discretion, the Board upon notice may take further testimony or hear argument. If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the Act]: Provided, That where an order directs reinstatement of an employee, back pay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him. . . .

*Section 10(e)*

Section 10(e) of the Act, ch. 372, § 10, 49 Stat. 453 (1935), as amended by Taft-Hartley, ch. 120, Title I, § 101, 61 Stat. 146 (1947), codified at 29 U.S.C. § 160(e) (1988), in pertinent part provides:

> (e) . . . The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. . . .

THE ADMINISTRATIVE PROCEDURE ACT

Section 7 of the Administrative Procedure Act, Pub. L. No. 89-554, 80 Stat. 386 (1966), codified as amended at 5 U.S.C. § 556(d) (1988), in pertinent part provides:

> (d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. . . .

(2)

No. 90-361

Supreme Court, U.S.
FILED
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CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1990

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KENRICH PETROCHEMICALS, INC., PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT*

---

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether Section 10(c) of the National Labor Relations Act, 29 U.S.C. 160(c), empowers the National Labor Relations Board to order the reinstatement with backpay of a supervisor who was discharged in retaliation for the union activities of employee members of her family.

2. Whether, if the Board has such authority, that authority was abused in the circumstances of this case.

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

### OPINIONS BELOW

The en banc decision of the court of appeals (Pet. App. 1a-44a) is reported at 907 F.2d 400. The panel decision (Pet. App. 146a-189a) is reported at 893 F.2d 1468. The decision and order of the National Labor Relations Board (Pet. App. 143a-145a), including the decision and recommended order of the administrative law judge (Pet. App. 45a-142a), are reported at 294 N.L.R.B. No. 41.

### JURISDICTION

The judgment of the en banc court was filed on July 9, 1990. The petition for a writ of certiorari was filed on August 29, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Petitioner manufactures and sells resins, plastics, dispersions, and coupling agents. Pet. App. 47a. Its seven office clerical employees were supervised by Office Manager Helen Chizmar, who had worked for petitioner for 24 years. Pet. App. 48a; A 198-199.[1] Helen Chizmar was related to three members of the clerical staff: Barbara Knorowski, her sister; Karen McPartlan, her daughter; and Catherine Chizmar, her daughter-in-law. Pet. App. 48a.

For many years, petitioner's production employees were represented by Local 8-406, Oil, Chemical and Atomic Workers International Union, AFL-CIO (the Union). Pet. App. 48a.[2] In May 1987, the Union began an organizing campaign among petitioner's office clerical employees. *Ibid.* The Board found that petitioner responded to the organizing campaign by threatening its employees with more onerous working conditions, loss of existing benefits, and other reprisals, including discharge, if they selected the Union as their representative; by changing the working hours of Barbara Knorowski and Karen McPartlan and removing McPartlan's telephone; and by requiring McPartlan, Knorowski, and Catherine Chizmar to be examined by the Company physician prior to returning to work. Pet. App. 132a-133a.[3]

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[1] "A" references are to the excerpts of the administrative record filed with the court of appeals.

[2] Helen Chizmar's father, a former employee of petitioner, was a key organizer of the production employees and served as the production unit's first shop steward. Pet. App. 48a.

[3] Petitioner did not challenge any of these unfair labor practice findings in the court of appeals, and the portion of

2. The only issue raised in the petition concerns the discharge by petitioner of Helen Chizmar, and the Board's order that she be reinstated with backpay. The facts concerning her discharge are as follows:

After all the clerical employees signed authorization cards for the Union, they informed Helen Chizmar that they had done so. Pet. App. 48a, 50a. Chizmar said she was shocked and asked why they had selected the Union. Judy Kobryn, one of the clerical employees, explained their reasons for wanting to join the Union and added, "[t]here's nothing you could do about it really, Helen, the letter [from the Union to petitioner] should be here by tomorrow." *Id.* at 50a-51a.

On May 22, petitioner's president, Salvatore Monte, received the Union's letter, which sought recognition and stated that the seven clerical employees had unanimously selected it to represent them. Pet. App. 48a-49a. Monte, who felt "betrayed" by the employees, attempted to determine the degree of employee support for the Union. *Ibid.* He concluded that McPartlan and Knorowski would support the Union because they were closely related to the

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the Board's order based on them was summarily enforced by the court. Pet. App. 147-148a.

The Board also found that petitioner committed additional violations of the Act by assaulting Knorowski, causing her to be absent from work, and failing to reemploy her; by causing Catherine Chizmar to be absent from work; by discharging McPartlan because of her union activity; and by discharging Helen Chizmar because of the union activities of her relatives. Pet. App. 133a. The court of appeals upheld all of these findings except those regarding McPartlan's discharge, which the court remanded to the Board for further consideration. *Id.* at 182a-187a.

Union's first shop steward and "the family is not going to back off from this position of going for the Union. * * *[I]t's in the family culture." *Id.* at 49a.

On May 29, petitioner received a copy of the Union's petition to the Board seeking to represent the clerical employees. Later that day, Monte called Helen Chizmar into his office, informed her that she was fired,[4] Pet. App. 51a, and then told Jill Bernicker, petitioner's buyer, that Chizmar was discharged because "[he] couldn't keep her for financial reasons and [he] was not going to put up with any union bullshit." *Id.* at 52a. That evening, Bernicker informed Knorowski, Kobryn, McPartlan, and Catherine and Helen Chizmar of her conversation with Monte. *Ibid.* A few weeks later, Catherine Chizmar expressed concern to Charles Lucania, a Kenrich Vice President, that her job was in jeopardy because of the discharge of Helen Chizmar (her mother-in-law), and because of the change in hours for her other relatives, Knorowski and McPartlan. *Id.* at 48a, 53a.

After winning a representative election held on July 2, the Union was certified by the Board as the clerical employees' bargaining representative. Pet. App. 50a. During subsequent negotiations with the Union, Monte remarked that he was going to "get rid of the whole [Chizmar] family." *Id.* at 97a.

3. The administrative law judge, whose decision was affirmed by the Board (Pet. App. 143a-145a), found that petitioner violated Section 8(a)(1) of the Act, 29 U.S.C. 158(a)(1), by discharging Helen Chizmar. Pet. App. 133a. The ALJ noted that "[i]t

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[4] Petitioner stated that the company had "to let [her] go * * * [because it] can't afford [her] anymore * * * [and] can get somebody for $20,000 less * * * [which it] plan[s] to do." Pet. App. 51a.

is well established that a discharge of a supervisory employee because of the Union activities of employees who were members of the supervisors' [*sic*] family, is violative of Section 8(a)(1) of the Act." Pet. App. 94a-95a. Citing *Advertiser's Mfg. Co.*, 280 N.L.R.B. 1185 (1986), enforced, 823 F.2d 1086 (7th Cir. 1987), the ALJ explained that "[s]uch a discharge, resulting not from any participation in union or concerted activities by the supervisor, but from the exercise of Section 7 rights of the employees, has the direct, severe and unmistakable thrust of interfering with those employee relatives in the exercise of their rights." Pet. App. 95a.

The ALJ found that petitioner had discharged Helen Chizmar in retaliation for her relatives' protected activity. Pet. App. 94a-98a. He concluded that the evidence did not support petitioner's contention that Chizmar was discharged because of a conflict of interest created by the unionization of her relatives. *Id.* at 99a. The ALJ noted that petitioner had never offered that ground for discharging Chizmar prior to the unfair labor practice hearing (*id.* at 99a-100a), had tolerated complaints from employees concerning Chizmar's alleged favoritism toward her relatives for a number of years without ever discussing the issue with Chizmar (*id.* at 101), and had discharged her without even knowing whether the Union would succeed in its organizing campaign (*id.* at 101a-102a). The ALJ concluded that Monte was not actually concerned about "any future problems that might arise with respect to [Chizmar's] carrying out her management responsibilities." Rather, the focus of his concern was her disloyalty in not "nipping in the bud the efforts of her relatives to organize" and the employee-relatives' disloyalty in choosing to unionize. *Id.* at 102a-103a.

The ALJ recommended that Chizmar be reinstated with backpay. *Id.* at 134a, 137a. In affirming the ALJ's decision, the Board agreed that "the asserted conflict of loyalty argument was pretextual." *Id.* at 144a n.2.

4. A panel of the court of appeals upheld the Board's conclusion that petitioner violated Section 8(a)(1) of the Act by discharging Helen Chizmar, noting that "the Board and the ALJ certainly were justified in finding that petitioner's belated explanation for the discharge was pretextual and [its] sole intent was to retaliate against Chizmar's relatives for attempting to unionize." Pet. App. 170a.

The panel majority concluded, however, that the Board had improperly ordered Chizmar's reinstatement. The majority asserted that, when an employer unlawfully discharges a relative-supervisor solely to discourage the relative-employees' union activity, a reinstatement remedy is "permissible only if" the employer successfully destroys the employees' organizational rights. Pet. App. 172a-173a. Because the Union prevailed in the representation election, the majority concluded, Chizmar's discharge had not undermined Union support. *Id.* at 173a. Therefore, the Board's order did "not serve any legitimate remedial purpose under the Act." *Id.* at 175a.

5. The court of appeals, sitting en banc, reversed the panel's decision. Pet. App. 3a. The court concluded that "the Board did not abuse its broad discretion" in ordering Chizmar's reinstatement with back pay because that remedy was "reasonably calculated to dispel the intimidation caused by her firing." *Id.* at 27a.

Initially, the court rejected the contention that the Board lacks power to order reinstatement of supervisors "because the Act does not protect a supervisor

who engages in union activity. * * * While it is uncontestably true that the Act does not protect a supervisor from being discharged for engaging in concerted activity, this does not deprive the Board of the authority to order the reinstatement of a supervisor whose firing resulted not from her own pro-union conduct, but from the employer's efforts to thwart the exercise of section 7 rights by protected rank-and-file employees." Pet. App. 13a.

The court noted that every court of appeals to address the issue has upheld the Board's power to order the reinstatement of supervisors in appropriate circumstances. Pet. App. 13a-14a. The court added that "[t]o the extent it can be argued that this question is ambiguously addressed by the statute, we believe the Board's long-standing interpretation of the Act as giving it the power to reinstate supervisors fired in violation of section 8(a)(1) is reasonable, and therefore owed deference. *NLRB v. United Food & Commercial Workers, Local 23*, 484 U.S. 112, 123 (1987)." Pet. App. 14a n.5.

The court disagreed with petitioner's contention that, because the employees' organizational rights were vindicated by the election of the Union, the reinstatement order did not serve a valid remedial purpose. Pet. App. 14a-15a. The court noted that, as a general matter, a discharge such as Chizmar's "must communicate to rank-and-file employees that the employer is willing to go to any lengths to crush section 7 activity." *Id.* at 16a. Moreover, the record evidence demonstrated that "Helen Chizmar's firing caused Catherine Chizmar to fear for her own job security despite her protected status." *Ibid.*

The court expressed disagreement with petitioner's argument that "the union's success in the election

provides adequate assurance" that any coercive effect of the firing of Helen Chizmar "has been fully dissipated and requires no remedial action." Pet. App. 16a. The court explained that "the collective bargaining process is an ongoing one in which employees have repeated opportunities to exercise their section 7 rights." Thus, "despite the union's success at the ballot box, many opportunities remained for the coercive impact of Helen Chizmar's discharge to take its toll on section 7 rights." *Ibid.* The court also noted that "the record reflects specific support for the conclusion that the effects of Kenrich's coercive conduct, if left unremediated, would be felt long after the election." *Id.* at 19a. The court concluded that "reinstatement in this situation, as in cases where supervisors are dismissed for failing to commit unfair labor practices, serves to dispel employees' fears and concomitant reluctance to fully exercise their rights, by demonstrating that the law sets boundaries on employers' ability to engage in this sort of conduct with impunity." *Id.* at 26a.[5]

Judge Greenberg, joined by Judges Garth and Hutchinson, dissented. In their view, Chizmar's reinstatement would serve no "legitimate remedial purpose." Pet. App. 27a. In addition, it would necessarily create "an actual conflict between her loyalties

[5] As the court further explained (Pet. App. 20a):

> By reinstating Chizmar and compensating her for lost wages, the Board's order protects the section 7 rights of Kenrich's employees by assuring them that they need not fear that the exercise of their rights will give the company a license to inflict harm on their family. It also protects the employees by reassuring their relatives who are supervisors that they need not feel that their jobs are dependent on their ability to dissuade their family members from engaging in protected activity.

to Kenrich and to her relatives, so long as they are employed by Kenrich." *Id.* at 29a. Because petitioner would be entitled to discharge Chizmar "soon after her reinstatement, in which case the adverse impact on her relatives" would be the same as if she had never been reinstated, the dissent was unable to "fathom how the policies underlying the Act" would be served by the reinstatement order. *Id.* at 33a.

## ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decisions of this Court or of any other court of appeals. Review by this Court therefore is unwarranted.

1. Petitioner does not challenge the Board's finding, upheld by the court of appeals, that it unlawfully discharged Helen Chizmar because her relatives sought to be represented by the Union. See Pet. 8. Rather, petitioner contends (Pet. 11) that Section 10(c) of the Act, 29 U.S.C. 160(c), precludes the Board from ordering that supervisors be reinstated with back pay because that Section authorizes the Board to grant such affirmative relief only to "employees,"[*] and supervisors are not employees under the Act (see 29 U.S.C. 152(3) and (11)). That argument is without merit. In *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 (1941), this Court held that the specific inclusion in Section 10(c) of authority to order reinstatement of employees did not preclude

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[*] Section 10(c) provides that the Board may require a person found to have committed an unfair labor practice "to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter."

the Board from ordering the reinstatement of applicants for employment who were denied jobs because of their union affiliation. The Court explained (313 U.S. at 189):

> To attribute such a [preclusive] function to the participial phrase [in Section 10(c)] introduced by 'including' is to shrivel a versatile principle to an illustrative application. We find no justification whatever for attributing to Congress such a casuistic withdrawal of the authority which, but for the illustration, it clearly has given the Board. * * *

That reasoning is equally applicable to reinstatement of supervisors where that remedy would effectuate the policies of the Act. As the Fifth Circuit stated in a seminal case, *NLRB* v. *Talladega Cotton Factory, Inc.*, 213 F.2d 209, 217 (1954), "[t]he contention that the discharge of supervisors for refusal to violate the Act may be effected with impunity because of their supervisory status evinces undue preoccupation with the statutory definition, rather than with the underlying purpose and intent of the Act as a whole." The court explained (*ibid.*):

> Though the Board concededly has no authority, statutory or otherwise, to reinstate supervisors as "employees" to redress their private grievance and penalize respondent, we see no reason why the Board, in the exercise of its statutory discretion, does not have the same remedial power to redress acts of indirect interference and restraint of ordinary employees through discharge of supervisors, as it admittedly has to redress acts of direct interference and restraint with the rights of the same employees to uninhibited self-organization. * * *

Similarly, as the Seventh Circuit observed in upholding the Board's reinstatement of a supervisor who was discharged in retaliation for her son's union activities:

> Carol Hahn [the supervisor] is not being reinstated so that she can help the union but so that Ronald Hahn [her son] and other protected employees will not be deterred from exercising their rights under section 7 by fear that if they do the company will try to get back at them, in any way it can, including by firing their relatives. * * *

*NLRB* v. *Advertisers Mfg. Co.*, 823 F.2d 1086, 1089 (1987).[7]

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[7] As petitioner acknowledges (Pet. 11 n.4), every court of appeals to consider the question has held that the Board has the power to order the reinstatement of supervisors in appropriate circumstances. See cases cited by the court of appeals at Pet. App. 13a-14a. See also *Local No. 207, Iron Workers* v. *Perko*, 373 U.S. 701, 707-708 (1963) (citing *Talladega Cotton* for the proposition that the Board's reinstatement of a supervisor would be appropriate if the supervisor's discharge reasonably caused "nonsupervisory employees to fear that they might meet the same fate if they adhered to the union"); *Florida Power & Light Co.* v. *IBEW*, 417 U.S. 790, 808 n.18 (1974) (citing *Talladega Cotton* in acknowledging the Board's power to order reinstatement of supervisors in appropriate circumstances).

Moreover, petitioner is clearly in error in asserting (Pet. 9-10) that the Board's interpretation of the scope of its authority under Section 10(c) is not entitled to deference. This Court has "traditionally accorded the Board deference with regard to its interpretation of the NLRA as long as its interpretation is rational and consistent with the statute." *NLRB* v. *United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 123-124 (1987). In any event, this Court's decision in *Phelps Dodge*, and its repeated approval of the Seventh Circuit's decision in *Talladega Cotton*, validate the reason-

2. a. Petitioner is not entitled to attack (Pet. 14-24) the propriety of a reinstatement remedy under the particular circumstances of this case. As the court of appeals noted (Pet. App. 14a-15a n.6), petitioner, in its arguments to the Board, did not object to the ALJ's recommendation that Helen Chizmar be reinstated. Before the Board and in its initial briefs to the court of appeals, petitioner contended only that Chizmar's dismissal did not violate Section 8(a)(1) of the Act. Following the initial briefing, the court of appeals panel requested the parties to address an issue of law—whether Chizmar's reinstatement was consistent with the statutory exclusion of supervisors from the Act's protection. (As petitioner notes (Pet. 6 n.3), the Board did not object to the panel's consideration of that issue.) See also Pet. App. 15a n.6.

Under Section 10(e) of the Act, 29 U.S.C. 160(e), reviewing courts lack jurisdiction, in the absence of extraordinary circumstances, to consider objections not raised before the Board. *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982). The requirement of Section 10(e) is not "'waived' simply because the [agency] fails to invoke it." *EEOC* v. *FLRA*, 476 U.S. 19, 23-24 (1986). Accordingly, petitioner may not assert the claim that, in the circumstances of this case, Chizmar's reinstatement would not effectuate the policies of the Act.[8]

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ableness of the Board's assessment that it retains authority under Section 10(c) to order reinstatement in certain circumstances of an individual who is not an employee.

[8] It is true that the panel did nevertheless directly consider this question in ruling that, while the Act did not preclude the Board from ordering the reinstatement of supervisors in some circumstances, it would not effectuate the policies of the Act

b. In any event, petitioner's contention (Pet. 17-19, 22) that the reinstatement of Helen Chizmar would create a conflict of interest in supervising her unionized relatives finds no support in the record. As found by the Board and upheld by the court of appeals, petitioner's claim that it discharged Chizmar out of concern for such a conflict of interest was pretextual. Petitioner does not challenge that finding here (Pet. 8).[9]

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to order such reinstatement in the circumstances here. Upon the Board's petition for rehearing, however, the court en banc reversed the panel's decision.

Because the issue whether the Board may order reinstatement of a supervisor in *any* circumstances goes to the boundaries of the Board's authority under the statute, consideration of *that* question by the court of appeals on its own motion (and this Court on review) would probably be permitted under Section 10(e). See, *e.g.*, *NLRB* v. *Ochoa Fertilizer Corp.*, 368 U.S. 318, 322 (1961) (objections to remedial order not raised to Board may not be raised "[a]t least when the Board has not 'patently traveled outside the orbit of its authority,' *Labor Board* v. *Cheney California Lumber Co.*, 327 U.S. 385, 388").

[9] Indeed, there is every indication that Chizmar was "on the company's side" and "did not assist in her [relatives'] union activities." Thus, the reinstatement order does not require the "company * * * to grasp a viper to its bosom." *NLRB* v. *Advertisers Mfg. Co.*, 823 F.2d at 1089.

Moreover, as the court of appeals noted (Pet. App. 21a n.9),

> [b]ecause the Board found as a matter of fact that Kenrich was not motivated by fears of a conflict of interest, it did not have occasion to consider the substantial question of whether the Act is violated when an employer who has tolerated a supervisor's family-related conflict of interest for a lengthy period of time decides that he

c. There is no merit in petitioner's contention (Pet. 19-21) that a reinstatement remedy is not necessary to make the clerical workers whole because they were not deterred by Helen Chizmar's dismissal from selecting the Union as their representative. As the court of appeals noted, "the collective bargaining process is an ongoing one" and "the record reflects specific support for the conclusion that the effects of Kenrich's coercive conduct, if left unremediated, would be felt long after the election." Pet. App. 16a, 19a. This conclusion is reasonable and finds support in the record.[10] Therefore, no further review is warranted.

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> will no longer tolerate that conflict because the supervisor's relatives have now unionized.

The court continued (*ibid.*):

> If Kenrich discharges Chizmar upon her reinstatement and an unfair labor practice proceeding is commenced, the balance the Board strikes in that proceeding between Kenrich's right to loyalty from its supervisors and its employees' Section 7 rights will be entitled to appropriate deference by this court.
>
> In such a proceeding, the Board will be able to consider whether a subsequent discharge is truly attributable to Kenrich's belief that Chizmar cannot effectively perform her responsibilities or whether the discharge is merely a remnant of hostility Kenrich feels toward its clerical workers because of their support for the union. * * *
>
> * * * The fact that Kenrich may * * * dismiss [Chizmar following reinstatement] for reasons that are lawful does not differentiate this from numerous other cases in which reinstatement has been ordered following a discharge for an impermissible reason.

[10] Petitioner's assertion that the backpay award is "nothing other than punitive" (Pet. 22) is also without merit. As the court below explained, "[b]y reinstating Chizmar, *and compensating her for her lost wages*, the Board's order protects the section 7 rights of Kenrich's employees by assuring them

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 1990

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that they need not fear that the exercise of their rights will inflict harm on their families." Pet. App. 20a (emphasis added). Thus, back pay is an appropriate part of a Board remedy designed to assuage employee fears of retaliation for engaging in protected activities.

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